Supreme Court, U.S.
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No.

In the Supreme Court of the United States

ERNEST EUGENE BRADY and MARRITTA KAY BRADY, husband and wife; JAMES DEAN BRADY, a single man, FLOSSIE MARIE BRADY, a single woman,
Petitioners,

v.

ABBOTT LABORATORIES, INC., an Illinois corporation; ROSS PRODUCTS, a division of Abbott Laboratories, Inc.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether federal reserved groundwater rights holders and other victims throughout the arid Southwest and Ninth Circuit who are injured by the illegal pumping of their groundwater are entitled to the equal protection of their State's Groundwater Code?

2. Whether civil and criminal defendants who illegally damage or destroy the groundwater of farmers and other federal reserved groundwater rights holders are entitled to absolute immunity under the old common law doctrine of reasonable use, notwithstanding modern legislation to the contrary?

3. Whether the Arizona Groundwater Code, and the Groundwater Codes of all the other States throughout the arid Southwest and Ninth Circuit, materially changed the old common law doctrine of reasonable use such that groundwater pumpers are no longer immune from liability for harm to adjoining landowners solely because their pumping benefits the property from which the groundwater is extracted?

PARTIES TO THE PROCEEDING
AND
CORPORATE DISCLOSURE STATEMENT

Petitioners are individual family farmers, Ernest Eugene Brady and his wife Marritta Kay Brady; his brother James Dean Brady; and their mother, Flossie Marie Brady, all residents of the State of Arizona. They are hereafter collectively referred to as the "Bradys".

Respondents are Abbott Laboratories, Inc., an Illinois corporation, and Ross Products, a division of Abbott Laboratories, Inc. They are hereafter collectively referred to as "Abbott".

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PETITION FOR A WRIT OF CERTIORARI

The Bradys respectfully petition for a Writ of Certiorari to review the Opinion and Order of the United States Court of Appeals for the Ninth Circuit (hereafter designated the "Ninth Circuit").

OPINIONS BELOW

On December 29, 2005, the Ninth Circuit issued its Opinion, reversing and remanding the District Court's Findings of Fact, Conclusions of Law and Judgment. The Ninth Circuit's Opinion is officially reported at *Brady v. Abbott Laboratories, Inc.*, 433 F.3d 679 (9th Cir. 2005).

On April 25, 2006, the Ninth Circuit issued its Order, denying the Bradys' Petition for Rehearing and Petition for Rehearing *En Banc*. The Ninth Circuit's Order is officially reported at *Brady v. Abbott Laboratories, Inc.*, 446 F.3d 924 (9th Cir. 2006).

STATEMENT OF JURISDICTION

The Ninth Circuit issued its Opinion on December 29, 2005, and denied the Bradys' timely Petition for Rehearing and Petition for Rehearing *En Banc* by Order dated April 25, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN CASE

This case involves the interpretation and application of numerous statutory provisions of the 1980 Arizona Groundwater Code. These provisions, and their lengthier

statutory counterparts (A.R.S. §§ 45-401; 45-513; 45-633; 45-634; 45-635), are set forth *verbatim* in Appendix E.

1. A.R.S. § 45-402(37) defines in relevant part the term "transportation" as "the movement of groundwater from the point of withdrawal to the point of use."

2. A.R.S. § 45-518(A) provides in relevant part that the director of the Arizona Department of Water Resources may issue a temporary dewatering permit only if the director determines, among other things, that (a) "the groundwater to be withdrawn pursuant to the permit will be used beneficially" and (b) "dewatering will not harm any person permitted to withdraw or use groundwater under this title."

3. A.R.S. § 45-541(A) provides in relevant part that groundwater withdrawn "pursuant to a groundwater withdrawal permit...may be transported [within a sub-basin] without payment of damages."

4. A.R.S. § 45-545(A) and (C) set forth the "damage rules applicable to all transportation of groundwater", and provide in relevant part that "in any action to recover damages" for the injury or impairment of the groundwater supply, "any landowner" may sue, and the court "may award reasonable attorney fees, expert witness expenses and fees and court costs to the prevailing party."

5. A.R.S. § 45-636 (A) and (C) provide in relevant part that a person who "knowingly violates or refuses to comply with a provision of...a permit...is guilty of a class 2 misdemeanor", and a person who "knowingly and intentionally withdraws or uses groundwater in violation of this chapter is guilty of a class 6 felony" or a "class 1

[or] class 2 misdemeanor", depending on the amount of illegally pumped groundwater at issue.

STATEMENT OF THE CASE

I. The Relevant Material Proceedings

On January 25, 2001, the Bradys filed their lawsuit against Abbott for destroying their pecan orchard by permanently depleting the shallow aquifer beneath their farm during Abbott's illegal dewatering activities.

Abbott alleged that it was immune from liability under the old common law doctrine of reasonable use and under A.R.S. § 45-541.

On March 31, 2003, the District Court denied Abbott's motion to dismiss as to the Bradys' negligence and nuisance claims, and denied Abbott's motion for summary judgment, concluding that Abbott's fraudulent concealment of its illegal dewatering activities had tolled the statute of limitations.

After a four day bench trial, the District Court entered its Findings of Fact, Conclusions of Law and Judgment on January 12, 2004, awarding the Bradys $618,766 in compensatory damages, and $618,766 in punitive damages due to Abbott's fraudulent concealment of its illegal activities, for a total award of $1,237,532. Abbott timely appealed on February 6, 2004, thereby vesting the Ninth Circuit with appellate jurisdiction pursuant to 28 U.S.C. § 1332(a).

On December 29, 2005, the Ninth Circuit, relying exclusively upon the old common law doctrine of reasonable use, issued its Opinion reversing the District Court's Judgment.

On April 25, 2006, the Ninth Circuit denied the Bradys' timely Petition for Rehearing and Petition for Rehearing *En Banc*.

II. The Relevant Material Facts

The relevant material facts for the Court's consideration are included in the District Court's Rule 52 Findings of Fact dated January 12, 2004 (Appendix C). These facts therefore constitute compelling evidence in support of the Bradys' Petition given the applicable standard of review that the Ninth Circuit erroneously failed to apply: reviewing the District Court's underlying factual determinations only for clear error, and being bound by those factual determinations unless they are clearly erroneous. *L.K. Comstock & Company v. United Engineers & Constructors, Inc.*, 880 F.2d 219, 221 (9th Cir. 1989); *InterPetrol Bermuda, Ltd. v. Kaiser Aluminum International Corporation*, 719 F.2d 992, 998 (9th Cir. 1983).

In 1987, the Bradys planted approximately 500 three-year-old pecan saplings. They fertilized and watered the saplings, waiting for the tap root system to grow close enough to the shallow aquifer 16 feet below to render surface irrigation unnecessary.

Over the next ten years, the Bradys gently nurtured the fragile saplings, and proudly watched them flourish and grow. The trees bore their first infant fruits in 1995, which the Bradys began selling.

In early 1998, the historical water level in the Bradys' wells dropped from 16 feet down to 32 feet. A year or so later, the pecan trees began throwing off their fruit, and then slowly started dying.

The Bradys' desperate life-saving efforts merely postponed the inevitable, as the pecan trees produced less and less fruit, ultimately producing nothing in 2003.

Abbott admitted that its destruction of the aquifer beneath the Bradys' farm was illegal and in violation of its dewatering permit from the Arizona Department of Water Resources.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Has Entered A Decision Which Conflicts With Its Own Earlier Decision On The Same Important Issue.

The Ninth Circuit ruled that the Bradys could not recover any damages, notwithstanding Abbott's illegal pumping, because the old common law doctrine of reasonable use held that "there is no liability incurred to an adjoining landowner for a resulting damage" if the pumped groundwater "is diverted for the purpose of making reasonable use of the land from which it is taken." *Brady v. Abbott Laboratories, Inc.*, 433 F.3d 679, 682-683 (9th Cir. 2005). The Ninth Circuit's sole support for its Opinion was an old Arizona Supreme Court decision from 1953, *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953), citing to an even older decision of the Washington Supreme Court from 1935, *Evans v. City of Seattle*, 47 P.2d 984 (1935).

In 1980, however, the Arizona Legislature promulgated the Groundwater Code, which the Ninth Circuit in *Cherry v. Steiner*, 716 F.2d 687 (9th Cir. 1983) held materially changed the old common law doctrine of reasonable use such that groundwater pumpers were no longer immune from liability for harm to adjoining landowners solely because their

pumping benefitted the property from which the groundwater was extracted.

The Ninth Circuit's clear error is poignantly revealed by the authoritative treatise "Arizona Environmental Law Manual" published by the State Bar of Arizona. In Chapter 3.2, entitled "Water Law", the author, Rita Pearson, the then-Director of the Arizona Department of Water Resources ("ADWR"), stated that the 1980 Groundwater Code "**essentially did away with the reasonable use doctrine** and replaced it with a complex system of groundwater withdrawal rights and permits....**The Code replaces the reasonable use doctrine** [such that] new groundwater use is restricted by permit requirements" (emphasis added).[1]

In his compelling dissent from the denial of rehearing *en banc*, Justice Hawkins also correctly recognized that "the commentators assume" that the 1980 Groundwater Code materially changed the old common law doctrine of reasonable use, citing to authoritative treatises which state that the Code "**replaced the traditional reasonable use doctrine**." *Brady v. Abbott Laboratories, Inc.*, 446 F.3d 924, 924 (9th Cir. 2006). Justice Hawkins further correctly observed that the 1980 Groundwater Code "**dramatically altered the groundwater landscape [and] significantly modified the rights of landowners to remove groundwater underlying their land**." *Id.* at 925.

Furthermore, in *Cherry, supra*, the Ninth Circuit recognized that the Arizona Supreme Court had already held that, **unlike** the old common law doctrine of reasonable use,

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[1]Arizona Environmental Law Manual, Chapter 3.2, *Water Law*, §§ 3.2.4.2 and 3.2.4.2.5 (Nicholas J. Wallwork ed. 1995).

the 1980 Groundwater Code protected a landowner's right to the "usufruct" of the groundwater. *Cherry*, *supra* at 693, n.1. A "usufruct" is the "right to use and enjoy all the advantages and profits of the property of another **without altering or damaging the substance of the property.**" Webster's New World Dictionary (2d ed. 1984)(emphasis added). Inherent within the very definition of the word lies the remedy expressly recognized by the Ninth Circuit and the Arizona Supreme Court, and by the Arizona Legislature in A.R.S. §§ 45-541(A) and 45-545, of an action for damages against those who, like Abbott here, illegally pump the groundwater and destroy the aquifer beneath their neighbor's land.

Abbott admitted that it illegally pumped the groundwater beneath the Bradys' farm in violation of its dewatering permit issued pursuant to the 1980 Groundwater Code. Abbott's illegal pumping destroyed the Bradys' legally protected usufruct right to the groundwater. There is not one state or federal court decision in the country which supports the Ninth Circuit's Opinion below that **illegal** pumping constitutes a "reasonable use". **Indeed, illegal pumping cannot, as a matter of law, ever constitute the "reasonable use" of either the groundwater or the property from which it was withdrawn**. The Ninth Circuit's Opinion to the contrary conflicts with its own earlier decision in *Cherry*, *supra*, is unsupported by any court in the country, and therefore should be vacated.

The Ninth Circuit improperly ignored these fundamental principles of groundwater law, and thereby deprived the Bradys, as well as all federal reserved groundwater rights holders, of the equal protection of the 1980 Arizona Groundwater Code, which was promulgated for the express purpose of protecting them and their precious groundwater

supply from damage and destruction. In direct conflict with its own earlier decision on the same important issue, the Ninth Circuit bestowed absolute immunity upon all civil and criminal defendants who damage or destroy the groundwater of farmers and other federal reserved groundwater rights holders throughout the arid Southwest and Ninth Circuit, right in the middle of one of the worst droughts in history. A detailed analysis of the Ninth Circuit's earlier decision proves the point with finality.

In *Cherry*, *supra*, the Ninth Circuit addressed the material impact that the 1980 Groundwater Code had on the old common law doctrine of reasonable use, stating, "We are indebted to the district court for its careful exposition of the Arizona statutes and case law in respect to rights in groundwater. We find the district court's analysis persuasive and in most respects adopt the opinion of the district court as the opinion of this court." *Cherry*, *supra* at 689.

The persuasive analysis of Arizona's statutes adopted by the Ninth Circuit included the District Court's recognition that even the 1977 amendments to the earlier 1948 Groundwater Code materially changed the old common law doctrine of reasonable use such that "the transporter could transport as much water off the property as was originally being used thereon, without the threat of injunction. **The transporter could be sued for damages, however, if it damaged other landowners who owned land over the same groundwater basin or aquifer**." *Cherry v. Steiner*, 543 F. Supp. 1270, 1274 (D. Ariz. 1982)(emphasis added).

The persuasive analysis of Arizona's statutes adopted by the Ninth Circuit further included the District Court's recognition that "the problem of transportation of groundwater has also been addressed by the legislation [of the

1980 Groundwater Code]" in response to the earlier decisions of the Arizona Supreme Court espousing the old common law doctrine of reasonable use. *Cherry v. Steiner*, 543 F. Supp. 1270, 1276 (D. Ariz. 1982). The District Court stated that, although the 1980 Groundwater Code "recognized" the old common law doctrine of reasonable use, "**the new law...provides that if such mining and transportation does lower the water table so as to diminish the water available to another landowner whose land overlies the common watertable, the transporter is subject to damages.**" *Cherry v. Steiner*, 543 F. Supp. 1270, 1276 (D. Ariz. 1982)(emphasis added).

The Ninth Circuit further adopted the District Court's recognition that, given the passage of the 1980 Groundwater Code, it was "misplaced" to rely upon "selected passages of Arizona case law [which] ignore the actions of legislatures and courts throughout the country." *Cherry v. Steiner*, 543 F. Supp. 1270, 1278 (D. Ariz. 1982). The District Court explained its rationale by stating, "**Water, particularly in the West, is becoming increasingly in demand and valuable. Recognizing the potential public shortages of water, legislatures, through the use of their police power, have passed legislation restricting private use.**" *Cherry v. Steiner*, 543 F. Supp. 1270, 1278 (D. Ariz. 1982)(emphasis added).

On appeal, in the course of rejecting a challenge to the constitutionality of the 1980 Groundwater Code by advocates of the old common law doctrine of reasonable use, the Ninth Circuit adopted the Arizona Supreme Court's decision in *Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981) and stated that Prescott's claim of immunity under A.R.S. § 45-541(A) "**did not preclude Chino Valley from recovering damages**" for the harm suffered due to Prescott's

pumping of the groundwater. *Cherry*, *supra* at 691 (emphasis added).

Here, Abbott asserted the identical claim of immunity under the old common law doctrine of reasonable use as recognized in A.R.S. § 45-541(A). Abbott's admission that it was illegally pumping **in violation of** its permit, not lawfully pumping "**pursuant to**" its permit as required by the statute for immunity, therefore entitled the Bradys to the equal protection of the 1980 Groundwater Code to recover damages for the harm inflicted upon them by Abbott's illegal pumping. *Cherry, Chino Valley*, *supra*; A.R.S. §§ 45-541(A) and 45-545.

II. The Ninth Circuit Has Entered A Decision On An Important Federal Question In A Way That Conflicts With A Decision Of The Arizona Supreme Court On The Same Important Issue.

In *Cherry v. Steiner*, 716 F.2d 687 (9th Cir. 1983), the Ninth Circuit adopted the Arizona Supreme Court's decision in *Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981) holding that Prescott's claim of immunity under A.R.S. § 45-541(A) "**did not preclude Chino Valley from recovering damages**" for the harm suffered due to Prescott's pumping of the groundwater. *Cherry*, *supra* at 691; *Chino Valley*, *supra* at 80, 638 P.2d at 1326 (emphasis added). The Ninth Circuit's Opinion below that Abbott's identical claim of immunity precluded the Bradys from recovering damages therefore conflicts with its own earlier decision in *Cherry*, *supra*, and its adoption of the Arizona Supreme Court's decision in *Chino Valley*, *supra*.

Moreover, the Arizona Supreme Court held that groundwater pumpers no longer had immunity under the old

common law doctrine of reasonable use as espoused in its earlier decision in the *Bristor* case–which case was the sole support for the Ninth Circuit's Opinion below–given the Arizona Legislature's promulgation of the 1980 Groundwater Code:

> The statements in *Bristor* and *Jarvis* do not mean that rights to the use of groundwaters cannot be modified prospectively by the Legislature.... **The doctrine of rule of property has no operation as against subsequent legislation** (emphasis added).

Chino Valley, *supra* at 81.

In response to the advocates of the old common law doctrine of reasonable use who argued that the 1980 Groundwater Code unconstitutionally restricted their otherwise unfettered right to pump groundwater with immunity, the Arizona Supreme Court stated that Arizona's rapidly dwindling groundwater required the 1980 Groundwater Code to "**restrict rights**" and "**abolish the prevailing uses of groundwater**" just as many other States throughout the country had done. *Chino Valley*, *supra* at 83 (emphasis added).

The Arizona Supreme Court held that the very title of the Code had put groundwater users on notice that their rights under the old common law doctrine of reasonable use would be "**significantly affected**" by the Code. *Chino Valley*, *supra* at 84.

Finally, the Arizona Supreme Court emphasized the material impact that the 1980 Groundwater Code had upon the old common law doctrine of reasonable use, holding that a groundwater pumper only had immunity under A.R.S. § 45-

541 "**provided withdrawal is permitted** under any of the provisions of the Act"; otherwise "**rules for determining damage are set out in A.R.S. § 45-545**" (emphasis added). *Chino Valley*, *supra* at 85, n.1.

Here, Abbott admitted that it illegally pumped the groundwater beneath the Bradys' farm in violation of its dewatering permit issued pursuant to the 1980 Groundwater Code. Abbott's illegal withdrawal of the groundwater was not "permitted" as a matter of law, and the Bradys therefore are entitled to the equal protection of the 1980 Groundwater Code "rules for determining damage" as set forth in A.R.S. § 45-545. The Ninth Circuit's Opinion to the contrary conflicts with its own earlier decision adopting the Arizona Supreme Court's decision in *Chino Valley*, *supra*, and therefore should be vacated. *Cherry*, *supra*.

In his compelling dissent from the denial of rehearing *en banc*, Justice Hawkins also correctly recognized that the Arizona Supreme Court in yet another case "clearly seems to have assumed" that the 1980 Groundwater Code protected victims like the Bradys, as well as all federal reserved groundwater rights holders, from the illegal pumping of their groundwater. *Brady v. Abbott Laboratories, Inc.*, 446 F.3d 924, 925 (9th Cir. 2006). Justice Hawkins correctly observed that the Arizona Supreme Court had held that federal reserved groundwater rights holders were "**adequately protected against groundwater depletion by the 1980 Groundwater Management Code, which restricts application of the reasonable use doctrine** and mandates conservation measures in some parts of Arizona" (emphasis added). *Id.* at 925, citing *In re General Adjudication in Gila River System & Source*, 195 Ariz. 411, 421, 989 P.2d 739, 749, n. 13 (1999).

Justice Hawkins' wisdom demonstrates the erroneous, and ultimately unconstitutional, nature of the Ninth Circuit's Opinion below, which deprives the Bradys and all federal reserved groundwater rights holders of the equal protection of the 1980 Groundwater Code, both here in Arizona and throughout the arid Southwest and Ninth Circuit. Justice Hawkins' citation to Justice Ginsberg's admonition that federal courts should maintain "a healthy respect for the federal-state relationship" is all the more compelling given the Ninth Circuit's patently erroneous and unconstitutional Opinion here. *Brady v. Abbott Laboratories, Inc.*, 446 F.3d 924, 926 (9th Cir. 2006), citing *Yniguez v. Arizonans for Official English*, 520 U.S. 43, 62-63 & n. 18 (1995).

III. The Ninth Circuit Has Entered A Decision Which Conflicts With The Express Provisions Of The 1980 Groundwater Code.

The Ninth Circuit recognized in *Cherry*, *supra*, that the 1980 Groundwater Code materially changed the old common law doctrine of reasonable use such that groundwater pumpers are no longer immune from liability for harm to adjoining landowners solely because their pumping benefits the property from which the groundwater is extracted. An analysis of the specific provisions of the 1980 Groundwater Code confirms this material point of law of exceptional importance throughout Arizona and the arid Southwest.

A. The 1980 Groundwater Code Places Severe Restrictions On The Old Common Law Doctrine Of Reasonable Use.

As the Ninth Circuit stated in *Cherry*, *supra*, the 1980 Groundwater Code "recognizes" the old common law doctrine of reasonable use in A.R.S. § 45-541, albeit with the severe

restrictions set forth by the Arizona Supreme Court in *Chino Valley, supra*. Section 45-541(A) provides in relevant part that groundwater withdrawn "pursuant to" a dewatering permit "may be transported without payment of damages."

The severe restrictions on the old common law doctrine of reasonable use are set forth in A.R.S. § 45-518(A), which requires a groundwater pumper to first obtain a special dewatering permit from ADWR, which can **only** be issued if the Director determines, among other things, that (1) **"the groundwater to be withdrawn pursuant to the permit will be used beneficially"**, and (2) **"dewatering will not harm any person permitted to withdraw or use groundwater"** (emphasis added).

In addition, the 1980 Groundwater Code provides immunity only to those applicants who "transport" the groundwater, a term defined in A.R.S. § 45-402(37) as meaning "the movement of groundwater from the point of withdrawal to the **point of use**" (emphasis added).

The Ninth Circuit, relying exclusively upon the old Arizona Supreme Court's decision from 1953 in *Bristor, supra*, erroneously held that "Arizona law does not require that the withdrawn water be 'used' so long as it is extracted for the reasonable beneficial use of Abbott's land." *Brady v. Abbott Laboratories, Inc.*, 433 F.3d 679, 683 (9th Cir. 2005). The express provisions of the 1980 Groundwater Code, specifically A.R.S. §§ 45-518(A)(3) and 45-402(37), prove that the Ninth Circuit misstated this material point of Arizona law, and thereby deprived the Bradys, and all federal reserved groundwater rights holders, of the equal protection of that law.

Under the old common law doctrine of reasonable use, Abbott could have simply started pumping the groundwater whenever it wanted, pumping as much as it wanted for as long as it wanted, all with immunity to the Bradys as long as its pumping benefitted its property. In stark contrast, the 1980 Groundwater Code changed the legal prerequisites for Abbott's immunity from merely a finding that the pumping would benefit Abbott's property, to findings **both** that Abbott's pumping would not harm other groundwater users like the Bradys **and** that the pumped groundwater would be used beneficially by Abbott.

Justice Farris therefore unnecessarily laments in his concurring opinion below that, especially in an arid, rapidly growing state like Arizona, the law should be changed to account for these important hydrological factors. Indeed, Arizona law **did** change with the promulgation of the 1980 Groundwater Code as set forth herein.

These new legal prerequisites for immunity memorialize the Arizona Legislature's clear intent to protect Arizona's precious groundwater supply and the compensable right to use groundwater as expressed throughout the 1980 Groundwater Code, from the general "Declaration of Policy" provisions, to the specific criminal violation provisions. *See* A.R.S. §§ 45-401, 45-513(C)(2), 45-518, 45-545, 45-633, 45-634, 45-635, 45-636.

Here, Abbott admitted that it illegally pumped the groundwater beneath the Bradys' farm in violation of its permit, not "pursuant to" its permit as required by the 1980 Groundwater Code for immunity. Abbott further admitted that it pumped much of the groundwater off its property into a drainage ditch to empty out into a desert wash nearly one mile away, where the groundwater was put to no use at all, let

alone "transported" to a beneficial "point of use" as required by A.R.S. §§ 45-402(37), 45-518(A)(3) and 45-541(A).

The Ninth Circuit misstated a material point of fact on this issue, stating that Abbott did not begin pumping the groundwater off its property until its on-site retention basins were "filled to capacity." *Brady v. Abbott Laboratories, Inc.*, 433 F.3d 679, 681 (9th Cir. 2005). Abbott's Rule 30(b)(6) representative admitted at trial, however, that the two retention basins "were never full", that there was only a "level of water in one of them", and that "the second one never received any water." These undisputed material facts further prove that Abbott did not use the groundwater beneficially as required by the 1980 Groundwater Code, A.R.S. §§ 45-402(37), 45-518(A)(3) and 45-541(A), as a condition precedent for immunity.

In his compelling dissent from the denial of rehearing *en banc*, Justice Hawkins also correctly acknowledged the Ninth Circuit's material error, stating that "**a compelling argument exists that even if *Bristor* applies to this dispute, the district court correctly determined that Abbott's offsite dumping of extracted groundwater, in violation of the very permit needed to extract the water in the first place, took Abbott's actions outside *Bristor's* protection.**" *Brady v. Abbott Laboratories, Inc.*, 446 F.3d 924, 924 n. 2 (9th Cir. 2006) (emphasis added).

The Arizona Supreme Court addressed this very situation in *Chino Valley*, *supra*, holding that a groundwater pumper was only entitled to immunity under A.R.S. § 45-541 of the 1980 Groundwater Code "**provided withdrawal is permitted**" under the Code; otherwise "**rules for determining damage are set out in A.R.S. § 45-545.**" *Chino Valley*, *supra* at 85, n.1 (emphasis added).

Justice Farris therefore unnecessarily laments in his concurring opinion below that the Arizona Legislature has not yet provided an express private cause of action, nor the Arizona Supreme Court an implied one, for those groundwater users harmed by the illegal and unreasonable pumping of groundwater by others.

B. The 1980 Groundwater Code Provides An Express Private Cause Of Action For The Recovery Of Damages By The Bradys For Abbott's Illegal Destruction Of The Aquifer Beneath Their Farm.

As the Arizona Supreme Court stated in *Chino Valley*, *supra*, by promulgating A.R.S. § 45-545, the Arizona Legislature created an express private cause of action for damages for those injured by the illegal pumping of groundwater in violation of a dewatering permit. As Justice Hawkins so wisely confirmed in his dissent from the denial of rehearing *en banc*, the Arizona Supreme Court held for a second time in yet another case that the 1980 Groundwater Code protected victims like the Bradys, as well as all federal reserved groundwater rights holders, from the illegal pumping of their groundwater. *Brady v. Abbott Laboratories, Inc.*, 446 F.3d 924, 925 (9th Cir. 2006), citing *In re General Adjudication in Gila River System & Source*, 195 Ariz. 411, 421, 989 P.2d 739, 749, n. 13 (1999).

Section 45-545 of the 1980 Arizona Groundwater Code is entitled "Damage rules applicable to **all** transportation of groundwater", and it unequivocally expresses the Arizona Legislature's clear intent that "in **any** action to recover damages" for the injury or impairment of their groundwater supply, "**any** landowner" may sue, and the court may award

"reasonable attorney fees, expert witness expenses and fees and court costs to the prevailing party."

This material point of law erroneously overlooked by the Ninth Circuit is further confirmed by contrasting the "damage" provisions of A.R.S. § 45-545 with the "penalty" provisions of A.R.S. § 45-635.

In A.R.S. § 45-545(A), "damages" are recoverable by "any landowner" for the "injury or impairment of the[ir] water supply." In A.R.S. § 45-635(A)(B), "penalties" are recoverable only by "the director" of ADWR for the "violation of a permit."

In A.R.S. § 45-545(C), the "prevailing party" is entitled to keep the court's award. In A.R.S. § 45-635(D), the director is required to deposit "all civil penalties...in the state general fund."

These provisions clearly demonstrate that the Arizona Legislature established two distinct statutory remedies for the illegal pumping of groundwater in violation of a dewatering permit: one private remedy of "an action to recover damages" by the injured landowner who may keep the court's award, and one public remedy of "an action to recover penalties" by the Director of ADWR who must deposit the penalties in the State's general fund.

Indeed, if the Arizona Legislature had intended to limit "any action to recover damages" described in A.R.S. § 45-545(A) only to actions by the Director of ADWR, then it would have used the same language it used in A.R.S. § 45-635(B) to limit actions to recover penalties to those brought by the Director of ADWR, thereby stating that an action to recover damages under A.R.S. § 45-545 "shall be brought by

the director in the superior court in the county in which the damages occurred." The fact that the Arizona Legislature did not use such language proves that it clearly intended to create two distinct statutory remedies: one for injured landowners like the Bradys and all other federal reserved groundwater rights holders, and one for the Director of ADWR.

The Ninth Circuit committed clear and reversible error by ignoring these fundamental provisions of the 1980 Groundwater Code in favor of an old Arizona Supreme Court decision from 1953, and thereby deprived the Bradys, as well as all federal reserved groundwater rights holders, of the equal protection of the very modern legislation that was promulgated for their protection. In direct conflict with the express provisions of the 1980 Groundwater Code, the Ninth Circuit bestowed absolute immunity upon all civil and criminal defendants who damage or destroy the groundwater of farmers and other federal reserved groundwater rights holders throughout the arid Southwest and Ninth Circuit, right in the middle of one of the worst droughts in history.

The Ninth Circuit's reported decision eviscerates longstanding groundwater law in the very part of the country which so desperately needs the equal protection of that law. The Bradys, on their own behalf and on behalf of all present and future federal reserved groundwater rights holders, implore this honorable Court to intervene and correct this manifest, and unconstitutional, injustice.

CONCLUSION

The Ninth Circuit's decision in *Cherry*, *supra*, and the Arizona Supreme Court's decisions in *Chino Valley* and *Gila River*, *supra*, post-date the promulgation of the 1980 Groundwater Code, and uniformly hold that the old common law doctrine of reasonable use was materially changed as a result of this sweeping legislation to protect Arizona's rapidly dwindling groundwater from the theretofore immunized pumping of those who invoked the now-outdated doctrine. The Ninth Circuit's exclusive reliance upon the old *Bristor* case which predated the 1980 Groundwater Code by decades was error, and it was clear and reversible error given the Arizona Supreme Court's pronouncement in *Chino Valley*, *supra*, that its old decision in *Bristor, supra,* was no longer the law of the land in Arizona given the passage of the 1980 Groundwater Code.

The provisions of the 1980 Groundwater Code prove that the Bradys have a remedy of an action for damages against Abbott for its illegal pumping and destruction of the aquifer beneath their farm. The Ninth Circuit's Opinion to the contrary conflicts with its own earlier decision on the same important issue and erroneously overlooks the express provisions of the 1980 Groundwater Code.

The Bradys therefore respectfully request the Court to take judicial notice of its own Rule 10(a), which expressly recognizes such manifest errors as compelling reasons for review. The Bradys respectfully request the Court to grant their Petition for a Writ of Certiorari, vacate the Ninth Circuit's Opinion and Order, affirm the District Court's Judgment, and thereby restore the equal protection of the law to the Bradys and all present and future federal reserved

groundwater rights holders throughout Arizona and the arid Southwest and Ninth Circuit.

RESPECTFULLY SUBMITTED,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-15257

[Filed April 25, 2006]

ERNEST EUGENE BRADY, husband;	)
MARRITTA KAY BRADY, wife;	)
JAMES DEAN BRADY, husband;	)
FLOSSIE MARIE BRADY, wife,	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
ABBOTT LABORATORIES,	)
an Illinois corporation (including Ross	)
Products Division of Abbor Laboratories,	)
improperly named),	)
Defendant-Appellant,	)
	)
and	)
	)
ABC ENTITIES, I-X; JOHN/JANE DOES,	)
I-X; ROSS PRODUCTS, a Division of Abbott	)
Laboratories, Inc.,	)
Defendants.	)
	)

Before: Jerome Farris, A. Wallace Tashima, and Consuelo M. Callahan, Circuit Judges. HAWKINS, Circuit Judge, dissenting from the denial of rehearing en banc.

ORDER

The panel has voted to deny the petition for panel rehearing. Judge Callahan votes to deny the petition for rehearing en banc and Judges Farris and Tashima so recommend.

The full court was advised of the petition for rehearing en banc and a judge of the court called for a vote on whether to rehear the matter en banc. On such vote, a majority of the nonrecused active judges failed to vote in favor of en banc rehearing.

The petition for panel rehearing and the petition for rehearing en banc are denied.

DISSENT

HAWKINS, Circuit Judge, dissenting from the denial of rehearing en banc:

We should have taken this case for en banc review because it presents an important question of state law that should have been certified to the Arizona Supreme Court: whether the "reasonable use" doctrine articulated in *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (Ariz. 1953) ("*Bristor*") has been modified, in certain drought-sensitive

areas of Arizona, by the enactment of the 1980 Arizona Groundwater Code ("the Code").[1]

Bristor established that a landowner owed no duty to an adjacent landowner for the extraction of groundwater, even where there is demonstrable damage to a neighbor's land, as long as the water taken is reasonably used on the overlying land.[2] In 1980, the Arizona Legislature, recognizing the state's expanding population and limited water supplies, enacted a comprehensive regulatory scheme which dramatically altered the groundwater landscape. The Code significantly modified the rights of landowners to remove

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[1] The commentators assume that it has. *See, e.g.*, Patrick and Archer, A Comparison of State Groundwater Laws, 30 Tulsa L.J. 123, 132 (1994) ("The 1980 Act replaced the traditional reasonable use doctrine that permitted virtually unlimited use of groundwater."); Paula Smith, Coercion and Groundwater Management: Three Case Studies and a "Market" Approach, 16 Envtl. L. 797, 850 (1986) ("For areas *outside AMAs*, groundwater may be withdrawn and used for 'reasonable and beneficial use.'") (emphasis added).

[2] Although certification of the state law issue was the primary reason to have en banc review, a compelling argument exists that even if *Bristor* applies to this dispute, the district court correctly determined that Abbott's offsite dumping of extracted groundwater, in violation of the very permit needed to extract the water in the first place, took Abbott's actions outside *Bristor*'s protection. *See Jarvis v. State Land Department*, 106 Ariz. 506, 479 P.2d 169, 171-72 (Ariz.1970) ("Percolating waters may not be used off the lands from which they are pumped if thereby others whose lands overlie the common supply are injured. *Such waters can only be used in connection with the land from which they are taken.*") (Citations omitted; emphasis added); *see also Farmers Investment Company v. Bettwy*, 113 Ariz. 520, 558 P.2d 14 (Ariz. 1976).

groundwater underlying their land. In certain drought-sensitive areas (Active Management Areas or "AMA's"), landowners may not even begin to extract groundwater from beneath their land without permission from the Director of the Arizona Department of Water Resources.

This case arose in just such an area. Abbott Laboratories ("Abbott") applied for and obtained a permit to withdraw groundwater from beneath its land and then proceeded to exceed the very restrictions placed upon that withdrawal. Abbott's actions so substantially depleted the surrounding water table as to destroy nearly 300 pecan trees growing on neighboring land. Those neighbors filed suit in the Arizona courts and, had the dispute remained there, there would be no need to ask the Arizona Courts about the issue. Abbott, however, exercised its removal rights, meaning the question would be decided in federal court.

The matter proceeded to a bench trial before a district judge well-versed in Arizona law. Brushing aside Abbott's arguments that *Bristor* permitted the "reasonable use" it had made of the groundwater and specifically noting Abbott's violation of the very permit that allowed the withdrawal of groundwater in the first instance, the district court found for the orchard owners, assessing both compensatory and punitive damages on Abbott.

On appeal, Abbott convinced a three-judge panel that *Bristor* applied to the dispute, notwithstanding the enactment of the Code. The panel apparently found it unpersuasive that the Arizona Supreme Court, while not specifically holding that the Code modified the common law as expressed in *Bristor* and its progeny, clearly seems to have assumed it did:

> We similarly approach the state law parties' argument that federal reserved rights holders may be adequately protected against groundwater depletion by the 1980 Groundwater Management Code, *which restricts application of the reasonable use doctrine and mandates conservation measures in some parts of Arizona.* For example, within "active management areas," it prevents the drilling of new wells or increased pumping, and requires permits for changes in use. See A.R.S. § 45-411 et. seq.

In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source, 989 P.2d 739, 749 n.13 (Ariz. 1999) (emphasis added).

Arizona law permits federal courts to certify state law questions to the Arizona Supreme Court,[3] and this was a perfect opportunity to do so. Even assuming the question to be an open one, the conflict between what *Bristor* allows and what the Code restricts[4] is so apparent that the Arizona courts should be allowed to say what the law of the state is — not what a federal appeals panel thinks it might be. A healthy respect for the federal-state relationship, as Justice Ginsberg reminded us in *Yniguez v. Arizonans for Official English*, 520

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[3] A.R.S. § 12-1861.

[4] *Compare* A.R.S. § 45-518 (A)(4)(requiring [Arizona Dep't of Water Resources] director to determine "dewatering [removal of groundwater] will not harm any person permitted to withdraw or use groundwater under this title") *with Bristor*, 255 P.2d at 238 ("If [groundwater] is diverted for the purpose of making reasonable use of the land from which it is taken, there is no liability incurred to an adjoining owner for a resulting damage").

U.S. 43, 62-63 & n.18, 137 L. Ed. 2d 170 (1995), demands no less.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-15257

[Filed December 29, 2005]

ERNEST EUGENE BRADY, husband;	)
MARRITTA KAY BRADY, wife;	)
JAMES DEAN BRADY, husband;	)
FLOSSIE MARIE BRADY, wife,	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
ABBOTT LABORATORIES,	)
an Illinois corporation (including Ross	)
Products Division of Abbor Laboratories,	)
improperly named),	)
Defendant-Appellant,	)
	)
and	)
	)
ABC ENTITIES, I-X; JOHN/JANE DOES,	)
I-X; ROSS PRODUCTS, a Division of Abbott	)
Laboratories, Inc.,	)
Defendants.	)
	)

Before: Jerome Farris, A. Wallace Tashima, and Consuelo M. Callahan, Circuit Judges.

OPINION

TASHIMA, Circuit Judge:

This is a diversity action arising under Arizona law and stems from Abbott Laboratories' ("Abbott") construction of a basement beneath its manufacturing facility. After a bench trial, the district court awarded judgment in favor of plaintiffs, Ernest Eugene Brady, Marritta Kay Brady, James Dean Brady, and Flossie Marie Brady (collectively, the "Bradys") for the illegal removal of groundwater, causing the water table below the Bradys' adjacent property to become permanently suppressed, resulting in the destruction of the Bradys' pecan orchards.

Abbott appeals, contending that the district court erred in: (1) concluding that Abbott owed the Bradys a duty under the common law doctrine of reasonable use; (2) finding that the applicable statute of limitations did not bar the Bradys' claims; (3) finding that the Bradys had proven their damages with sufficient certainty; and (4) awarding the Bradys punitive damages. We have jurisdiction under 28 U.S.C. § 1291. Because we hold that Abbott owed the Bradys no duty under the common law doctrine of reasonable use, we reverse. We do not reach Abbott's other contentions.

Background

Abbott and the Bradys are neighboring landowners in Casa Grande, Arizona. Abbott operates a manufacturing facility, while the Bradys are pecan farmers. In the fall of 1997, Abbott sought to expand its manufacturing facilities and

began excavating its property in order to build a large underground storage structure. In connection with the project, Abbott applied for and received an emergency de-watering permit from the Arizona Department of Water Resources ("ADWR"). In its permit application, Abbott sought approval to remove a total of 2.07 acre-feet of groundwater from the aquifer underneath its property. The permit specified that Abbott was to pump the groundwater into an on-site retention basin where it could eventually re-absorb into the aquifer. The ADWR also required Abbott to report its de-watering activity on an annual basis.

Once work began, Abbott quickly encountered more water than expected. Abbott expanded its pumping activity in order to keep the excavation free from water during construction, but failed to seek a permit to extract additional groundwater. As a result of Abbott's additional pumping, Abbott's on-site retention basins filled to capacity and Abbott then channelled the excess groundwater into a ditch that ran off the property. While there is some dispute regarding how much water was discharged into the ditch, it is undisputed that Abbott did not transport any of the groundwater off its property for use on other land. Abbott's pumping ended around March, 1998, at which point Abbott had extracted in excess of 122 acre-feet of groundwater.

Abbott acknowledges that it violated the scope of its de-watering permit by removing approximately 122 acre-feet of groundwater. Abbott also admits that it incorrectly reported its de-watering activity to the ADWR by listing no de-watering activity in 1997 or 1998, and failing to file a report in 1999. In order to settle its violations with the ADWR, Abbott agreed to pay a fine of $6,508.50 to the ADWR.

The district court properly found that prior to Abbott's de-watering, the water table below the Bradys' property was at 16 feet below ground level. Following Abbott's de-watering, the water table below the Bradys' property became permanently suppressed to 32 feet, which is the depth of the basement on the Abbott property. The Bradys' pecan trees drew water through feeder roots that were dependent on the relatively shallow water table (as opposed to being irrigated). Abbott's de-watering activity lowered the water table, depriving the Bradys' orchard of water, and ultimately killed the pecan trees.

Once they learned of Abbott's de-watering activity, the Bradys commenced this action for negligence and nuisance. Following a four-day bench trial, the court entered judgment in favor of the Bradys on both claims. It found that Abbott had breached its duty in tort under the common law doctrine of reasonable use. The court awarded the Bradys $618,766 in compensatory damages and $618,766 in punitive damages, for a total recovery of $1,237,532. On appeal, Abbott argues that the district court erred because the common law doctrine of reasonable use permitted Abbott to withdraw percolating groundwater, without incurring liability to the Bradys, so long as it was taken for the reasonable use of Abbott's property.[1]

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[1] We note that the Bradys bring only common law tort claims. At oral argument, they expressly disclaimed reliance on any statutory claim under the Arizona Groundwater Code. Thus, the question of whether a private right of action for negligence *per se* can be implied under Ariz. Rev. Stat. § 45-518(A) is not before us.

Discussion

The common law doctrine of reasonable use governs the use of percolating groundwater in Arizona. *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173, 178-79 (Ariz. 1953).[2] Whether Abbott owed the Bradys a duty under the common law doctrine of reasonable use is a question of law, which we review *de novo*. *Vollendorff v. United States*, 951 F.2d 215, 217 (9th Cir. 1991).

In *Bristor*, the Arizona Supreme Court explained that the doctrine of reasonable use permits the extraction of groundwater

> so long as it is taken in connection with a beneficial enjoyment of the land from which it is taken. If it is diverted for the purpose of making reasonable use of the land from which it is taken, there is no liability incurred to an adjoining owner for a resulting damage.

Bristor, 255 P.2d at 180. The court noted that the doctrine does not "prevent any reasonable development of [one's] land by mining or the like, although the underground water of neighboring proprietors may thus be interfered with or diverted." *Id.* (quoting *Canada v. City of Shawnee*, 1936 OK 803, 179 Okla. 53, 64 P.2d 694, 697 (Okla. 1936)).

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[2] While the Bradys denominate their claims as claims for negligence and nuisance, the substance of both claims is the same. Because the common law doctrine of reasonable use is the controlling legal standard governing a landowner's rights to percolating groundwater underneath its property, *see Bristor*, 255 P.2d at 178-79, the determinative inquiry is whether Abbott violated its duty under the doctrine of reasonable use.

Extracting groundwater and using it for the benefit of off-site land, however, is not a permitted reasonable use. *Id.*

This distinction is well illustrated by *Evans v. City of Seattle*, 182 Wash. 450, 47 P.2d 984 (Wash. 1935), cited with approval by the Arizona Supreme Court. *Bristor*, 255 P.2d at 178. In *Evans*, the City of Seattle owned a gravel pit from which it produced gravel for its roads. *Evans*, 47 P.2d at 984. The plaintiffs owned land adjacent to the City's gravel pit and depended on spring and stream water for domestic purposes and irrigation. *Id.* The City constructed a ditch leading away from its properties to drain percolating water seeping into the gravel pit so that the City could extract more gravel from the pit. *Id.* As a result of the City's de-watering, the plaintiffs suffered a total loss of their water supply. *Id.* The Washington Supreme Court denied relief, holding that the "City was making a reasonable use of its own property, and that the draining of the gravel pit was for the reasonable and proper purpose of extracting the gravel for use." *Id.* at 988.

By contrast, in *Farmers Investment Co. v. Bettwy*, 113 Ariz. 520, 558 P.2d 14 (Ariz. 1976), the defendant mining companies extracted groundwater near farms owned by plaintiffs and transported that water to *other* lands where it was used for mining activities. *Id.* at 16. The court, relying on *Bristor*, recognized that the reasonable use "rule does not prevent the extracion [sic] of ground water subjacent to the soil so long as it is taken in connection with a beneficial enjoyment of the land *From which it is taken.*" *Id.* at 20 (quoting *Bristor*, 255 P.2d at 180) (emphasis in *Bettwy*). However, because the water was not withdrawn to benefit the land from which it was taken, but was transported to and used on other property, the court concluded that the defendants' use was not reasonable. *Id.* at 21.

Here, the district court relied on *Bettwy* to conclude that Abbott was not making a reasonable beneficial use of its land when it extracted the groundwater. That was error. For unlike the defendants in *Bettwy*, Abbott did not withdraw groundwater from its property for use "off the lands from which they are pumped." *Bettwy*, 558 P.2d at 20. Rather, Abbott withdrew the groundwater for the purpose of expanding its manufacturing facilities, which was an improvement of the land from which the water was withdrawn; therefore, it was a permitted beneficial use under Arizona law. *See Bristor*, 255 P.2d at 180; *see also Evans*, 47 P.2d at 987. While some of the groundwater was channeled off of Abbott's property, this is immaterial because Arizona law does not require that the withdrawn water be "used," so long as it is extracted for the reasonable beneficial use of Abbott's *land*. *See Bristor*, 255 P.2d at 180; *see also Evans*, 47 P.2d at 987.

Accordingly, because we conclude that Abbott's de-watering activity was protected by the common law doctrine of reasonable use, the Bradys' negligence and nuisance claims must fail. The judgment of the district court is reversed and the case is remanded with directions to enter judgment for Abbott.

REVERSED and REMANDED.

CONCURRENCE

Farris, Circuit Judge, concurring:

I agree with Judge Tashima that *Bristor v. Cheatham* is controlling. If we were not bound to follow the Arizona Supreme Court, I would urge that Arizona's reasonable use doctrine no longer depend solely upon whether the use of the water benefits the property from which it is extracted. Accounting for the amount of water used, considering the utility of competing water uses, and acknowledging the rights of adjacent water users seems especially important in an arid, rapidly growing state like Arizona.

In authorizing strict water permit restrictions as well as public notice and the opportunity for administrative hearings on proposed water permits, the Arizona legislature has indicated that Arizona water users must consider the rights of adjacent property-holders. Ariz. Rev. Stat. §§ 45-518(A)(4), 45-523 (2005). Unfortunately for the Bradys and other Arizona water plaintiffs, the Arizona legislature has not provided an express private cause of action, nor has the Arizona Supreme Court had occasion to imply one, against those who, for the benefit of their own property, unreasonably and illegally interfere with the water rights of their neighbors.

I therefore concur in the majority opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-01-0886-PHX-JAT

[Filed January 12, 2004]

Ernest Eugene Brady, et. al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
Abbott Laboratories, Inc., an Illinois Corporation; et. al.,	)
	)
Defendants.	)
	)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

From December 9, 2003, to December 12, 2003, the Court presided over the bench trial in this matter. Following such trial, the Court hereby finds and concludes as follows.

There are two theories of damages in this case: compensatory damages and punitive damages. Compensatory damages are sought under two legal theories: negligence and

nuisance (thought the damages for both theories are the same).[1]

I. COMPENSATORY DAMAGES

A. FINDINGS OF FACT

1. Plaintiff Gene Brady has 5 pecan trees on his property that are approximately 47 years old.

2. For the 18 years preceding the late 1990s, these trees produced approximately 200 pounds of pecans per tree per year.

3. In the mid to late 1980s, Plaintiff James Brady planted approximately 500 pecan trees on his property, which were ultimately thinned down to 290 trees.

4. In the fall of 1997, Defendant Abbott undertook the building of a basement on its property, which neighbors the Bradys' property.

5. In order to build the basement, Defendant's hydrologist, Dames and Moore, advised that Defendant needed to permanently suppress the groundwater table on the property.

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[1] In its proposed findings of fact and conclusions of law, Defendant re-urges its statute of limitation argument. However, the Court already denied judgment on the basis of statute of limitations in ruling on the summary judgment and judgment on the pleadings motions. The Court will not re-visit this argument herein as it was not raised during the presentation of evidence and has been resolved.

6. In order to build the basement, Defendant pumped water out of the ground to dry out the construction site.

7. Beginning November 4, 1997, Defendant was pumping more water than its retention basins could hold, so it began pumping water into a drainage ditch that ran off its property.

8. All of Defendant's pumping activities exceeded the scope of its pumping permit from the Arizona Department of Water Resources (ADWR). The activities exceeded both the volume allowed by the permit and the temporal scope of the permit.

9. Both Plaintiffs' pecan trees began dying in 1997.

10. When a pecan tree is dying, it first will quit producing fruit. Then, the tree will die from the top down (this process can take years before the tree is completely dead).

11. By 2003, neither Plaintiffs' pecan trees were producing any fruit.

12. The rust ring in the Brady well reflects that for some period of time, the water level of the well was 16 feet from ground level.

13. The Dames and Moore report prepared for Defendant before the dewatering states that the water table on the Abbott property was at 16 feet.

14. The Bradys have now pulled the pump in their well and, as of today, the water level in the well is 32 feet from ground level.

15. 32 feet is the depth of the basement on the Abbott property to which the water level needed to be suppressed.

16. Some of the hydrographs prepared by Defendant's expert reflected that at some points the water level in the Abbott wells was down over 15 feet from a 1997/1998 measurement.

17. There are no Abbott wells on a direct line between the Brady property and the basement.

18. Defendant's expert's hypothetical model showed that based on the pumping information he received from Abbott, in his opinion the water table level would return to its pre-dewatering level.

19. The water table level on the Brady property has not returned to 16 feet. Thus, the facts in this case are inconsistent with Defendant's expert's hypothetical model.

20. Plaintiffs' expert opined that the water level has not returned to 16 feet because the aquifer under the Bradys' property has been permanently suppressed to 32 feet, as Defendant's Dames and Moore report indicated was required for the building of the basement. The Court finds this opinion to be credible and consistent with the facts.

21. Defendant's horticulturalist testified that pecan trees cannot survive without 6 acre feet of irrigation per tree.

22. The 5 trees on Gene Brady's property survived, and produced fruit, without ever receiving any irrigation for at least 18 years.

23. The 290 trees on James Brady's property survived and began producing fruit without ever receiving 6 acre feet of irrigation per tree. Indeed, deliveries of irrigation water to the property only reached 4 acre feet in 1 year, 3 to 4 feet in each of 6 years, and otherwise less than 3 feet in all other years.

24. Because Defendant's horticulturalist's testimony was inconsistent with the facts, the Court does not find his opinion to be dispositive.

25. Defendant's horticulturalist testified that all feeders roots, which receive the water for a pecan tree, are located in the top 3 to 4 feet of soil; therefore, as long as the ground water table is below 8 feet (to prevent the tree from drowning), the depth of the ground water table is irrelevant.

26. Photographs of a pecan tree of James Brady showed that feeder roots on James Brady's tree exist at the 12 foot depth (the depth was limited to 12 feet because the back hoe that dug down did not have any further reach). These roots were observed by the Bradys and their hydrologist.

27. Literature on pecan trees relied on by Plaintiffs and Defendant stated that the ground water level for growing pecan trees needs to be between 8 and 20 feet.

28. Defendant's horticulturalist never personally observed Plaintiffs' trees' roots.

29. Because Defendant's horticulturalist's testimony was inconsistent with the facts and the literature, the Court does not find his opinion to be dispositive.

30. Accordingly, the Court finds that the Brady pecan trees depended on water from the aquifer as reached by the trees' feeder root system. Once the aquifer was lowered due to the actions of Defendant, the trees began dying and quit producing fruit.

31. Plaintiff Gene Brady's total compensatory damages in this case are $22,444.

32. The total compensatory damages for the pecan trees located on James Brady's property and James Brady's other losses are $596,322.

B. CONCLUSIONS OF LAW

1. To establish a cause of action for negligence, a plaintiff must show a duty, a breach of that duty, causation, and injury or damages. *Saucedo v. Salvation Army,* 24 P.3d 1274, 1278 (Ariz. App. 2001).

2. Whether a duty is owed with respect to the use of groundwater is somewhat unclear under Arizona law. *Compare In re General Adjudication of all Rights of Use Water in the Gila River System and Source,* 9 P.3d 1069, 1083, ¶ 47 (Ariz. 2000) (holding "because a well owner does not own underground water, and because landowners have no legally recognized property right in potential, future groundwater use, the constitutional [taking] argument is substantively without merit")(internl citations and quotations omitted) *with Paloma Inv. Ltd. Ptns. v. Jenkins,* 978 P.2d 110, 115, ¶ 22 (Ariz. App. 1998) (holding that in general water rights are property rights, and further holding that the landowner's right to percolating ground water is a usufruct, *i.e.*, the right to use property belonging to another); *and Farmers Inv. Co. v. Bettwy,* 558 P.2d 14, 19-20 (Ariz. 1976),

("the owner of lands overlying subterranean waters ... may extract such water for a reasonable, beneficial use of the land from which the same is taken," however, "percolating waters may not be used off the lands from which they are pumped if thereby others whose lands overlie the common supply are injured.")

3. The Court determined on summary judgment that the result of these cases is that Plaintiffs have a usufruct interest in the groundwater sufficient to maintain a negligence or nuisance claim, but not to maintain a constitutional taking claim.

4. To show causation, Plaintiffs must show, "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have of occurred." *Robertson v. Sixpence Inns of America, Inc.*, 789 P.2d 1040, 1047 (Ariz. 1990).

5. To recover damages on a lost profits claim, Plaintiffs must prove their damages to a reasonable certainty. *Rancho Pescado, Inc. v. Northwestern Mut. Life Ins. Co.*, 680 P.2d 1235, 1245-46 (Ariz. App. 1984).

6. To state a cause of action for nuisance, a plaintiff must be able to show a condition that represents an unreasonable interference with the plaintiff's use and enjoyment of his property and causes damage. *Graber v. City of Peoria*, 753 P.2d 1209, 1211 (Ariz. App. 1988).

7. The "unreasonable interference" is determined by the harm to the plaintiff caused by the condition, not by the conduct of the party creating the condition. *Id.*

C. RESULT

Defendant breached its duty to Plaintiffs by pumping ground water off Defendant's land and depleting Plaintiffs' usufruct interest in the water. This breach of duty caused the aquifer under Plaintiffs' property to be permanently suppressed from 16 feet to 32 feet. The suppression of the aquifer to 32 feet damaged plaintiffs' pecan trees to the point that they quit producing fruit because their root structure drew water between the 8 and 20 foot level as indicated in the literature. Plaintiffs are entitled to compensatory damages in the amount of $618,766 on their negligence claim.

Alternatively, Defendant's unauthorized pumping of the groundwater constituted an unreasonable interference with Plaintiffs' use and enjoyment of their farm land and caused damage by damaging the pecan trees to the point that they no longer produce fruit. Accordingly, Plaintiffs are entitled to compensatory damages on their nuisance claim. However, because such damages are the same damages as their negligence claim, the Court will not award additional damages.

II. PUNITIVE DAMAGES

A. FINDINGS OF FACT

1. Per the report of Defendant's hydrologist, Dames and Moore, Defendant intended to permanently suppress the aquifer.

2. Defendant did not have, or request, the required permits from ADWR to dewater at the volume they dewatered.

3. Defendant did not have, or request, the required permits from ADWR to dewater during all times in which Defendant was in fact dewatering.

4. Defendant filed false reports with ADWR regarding its dewatering activities.

5. Third party witnesses observed a great volume of water following off Defendant's land.

6. Mr. Fuller, the representative of Defendant who prepared the false reports to ADWR, neither reviewed the daily field reports available to Defendant regarding the amount of dewatering nor observed the actual amount of water following off the property before filing the inaccurate data with ADWR.

7. Defendant knew a permit from ADWR was required in this water management district to regulate and protect the water interests of all groundwater users as they related to each other.

8. Defendant knew that any permits for dewatering that it had received would be revoked if the cause given for the dewatering ceased to exist.

9. ADWR found Defendant in violation and fined Defendant.

B. CONCLUSIONS OF LAW

1. Under Arizona law, in order "[to] recover punitive damages something more is required over and above the mere commission of a tort." *Linthicum v. Nationwide Life Insur.*, 723 P.2d 678, 679 (1986) (internal citations omitted).

2. Plaintiffs must establish by clear and convincing evidence that Defendant, with an "evil mind," engaged in aggravated and outrageous conduct, which proximately caused Plaintiffs' injury. *Saucedo v. The Salvation Army,* 24 P.3d 1274, 1278-79, ¶11, ¶13 (Ariz. App. 2001). Plaintiffs must prove that Defendant committed outwardly outrageous, malicious, or fraudulent conduct, *Id.* at ¶ 11. Plaintiff can make this showing by proving that Defendant consciously pursued a course of conduct knowing it created a substantial risk of significant harm to others. *Gurule v. Ill. Mut. Life & Cas. Co.,* 734 P.2d 85, 87 (Ariz. 1987).

3. The "Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Auto Insur. Co. v. Campbell,* 123 S.Ct. 1513, 1519-20 (2003).

4. "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Id.* at 1525.

5. Punitive damages must be evaluated in light of the following guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 1520.

C. RESULT

In this case, Defendants actions in dewatering without the approval of ADWR, knowing that such approval was for the purpose of protecting neighboring water users such as Plaintiffs, with the intent to permanently suppress the aquifer;

and, then filing false reports without ever reviewing the available materials to assess its actual water use was outrageous conduct that was outwardly fraudulent and was conduct that consciously disregarded a substantial risk to neighboring farmers. Additionally, these actions increased Plaintiffs' harm as they prevented ADWR from assessing the water usage and potentially stopping it before the aquifer became permanently suppressed which is the cause of Plaintiffs' injury. Accordingly, the Court finds Plaintiffs are entitled to an award of punitive damages. The Court finds that an award of one time compensatory damages comports with the due process requirements. Accordingly, Plaintiffs are entitled to punitive damages in the amount of $618,766.

III. JUDGMENT

Based on the foregoing,

IT IS ORDERED that the Clerk of the Court shall enter judgment for the Plaintiffs and against the Defendant in the amount of $1,237,532.

IT IS FURTHER ORDERED that Defendant's oral Motion for Judgment as a Matter of Law (Doc. #95) is denied.

IT IS FURTHER ORDERED that Defendant's oral Motion to Dismiss Punitive Damage Claim (Doc. #95) is denied.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Take Additional Testimony (Doc. #103) is denied.[2]

IT IS FURTHER ORDERED that Defendant's Motion to Strike (Doc. #105) is denied as moot because the Court has not considered any additional evidence.

DATED this 9 day of Jan., 2004.

/s/
James A. Teilborg
United States District Judge

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[2] Pursuant to Court Order, each side presented supplemental briefing to address Defendant's assertion in closing argument that Plaintiffs could not recover future damages because they did not elicit testimony that reduced their future damages to present value. After considering the cases cited by both parties, the Court finds that Arizona law does not preclude a plaintiff from receiving future damages simply because he has failed to reduce those damages to present value.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-01-0886-PHX-JAT

[Filed March 31, 2003]

Ernest Eugene Brady; et. al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
Abbott Laboratories, Inc.,	)
an Illinois, Corporation; et. al.,	)
	)
Defendants.	)
	)

ORDER

Pending before this Court are Defendant Abbott Laboratories Motion for Judgment on the Pleadings and Motion for Summary Judgment.

I. LEGAL STANDARD

A. JUDGMENT ON THE PLEADINGS

A motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), "is properly granted when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Nelson v. City of Irvine,* 143 F.3d 1196, 1200 (9th Cir. 1998). In other words, dismissal pursuant to Federal Rule of Civil Procedure 12(c) is inappropriate in circumstances in which, if the facts were as pleaded, they would entitle the plaintiff to a remedy. *Merchants Home Delivery Serv., Inc. v. Hall & Co.,* 50 F.3d 1486, 1488 (9th Cir. 1995).

B. SUMMARY JUDGMENT

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, summary judgment is mandated, "...against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will beat the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Initially, the movant bears the burden of pointing out to the Court the basis for the motion and the elements of the causes of action upon which the non-movant will be unable to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to the non-movant to establish the existence of material fact. *Id.* The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts" by "com[ing] forward with 'specific facts

showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (quoting Fed. R. Civ. P. 56(e)). A dispute about a fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-movant's bare assertions, standing alone, are insufficient to create a material issue of fact and defeat a motion for summary judgment, *Id.* at 247-48.

II. FACTUAL BACKGROUND

This dispute arises from Defendant's use of ground water. In the complaint, Plaintiffs allege that Defendant pumped approximately 122 acre-feet of groundwater from Defendant's property, which exceeded the amount allowed to be extracted in Defendant's permit. Defendant has admitted that it pumped approximately this amount of water and that such amount exceeded the amount allowed by the permit. Plaintiffs allege that Defendant built a basement that is 110 feet long, 47 feet wide and 32 feet below ground level. Defendant admits that it built a basement of approximately this size. Both parties agree that the ground water was removed to allow Defendant to construct its basement. Plaintiffs also allege that Defendant failed to maintain current, accurate records of its withdrawal of ground water. Defendant admits to deficiencies in its reporting in 1997 and 1998.

Plaintiffs allege, and Defendant's do not dispute, the Plaintiffs own and operate a orchard that is south of Defendant's property. Plaintiffs further allege that the removal of water recounted above harmed the amount of water available to Plaintiffs. Based on this alleged harm, Plaintiffs brought a claim for negligence, nuisance, conversion, trespass, and infliction of emotional distress.

III. DISCUSSION

A. STATUTE OF LIMITATIONS

Though raised in Defendant's Motion for Summary Judgment, the Court will consider Defendant's statute of limitations defense first. The Court will do so because, if Plaintiffs did not meet the statute of limitations, then their claims will be dismissed; thereby rendering all other issues in this case moot.

Defendant argues that the fact that the conduct that is the subject of this lawsuit occurred in 1997 and early 1998 is undisputed. Additionally, Defendant argues that Plaintiffs have admitted that they were aware of the alleged drops in the ground water level no later than February of 1998. Defendant continues that the statute of limitations applicable to this case is two years. *See* A.R.S. § 12-542. It is undisputed that Plaintiffs first filed this action on January 25, 2001 in superior court (at a later date, this action was removed to federal court). Thus, Defendants conclude that because January 2001 is approximately three years after Plaintiffs learned of the alleged harmed, the claims are barred by the applicable statute of limitations.

Plaintiffs assert that Defendant filed a false report with the Arizona Department of Water Resources ("ADWR") in 1997 which incorrectly indicated that Defendant had pumped no ground water that year. Plaintiffs' Statement of Facts, ¶ 9. Further, Plaintiffs assert Defendant failed to file any report for 1998. *Id.* at ¶ 10. While Defendant raises some objections to these paragraphs to Plaintiffs' Statement of Facts, Defendant does not dispute the truth of these facts. Plaintiffs conclude in their response to Defendant's Motion for Summary Judgment that because Defendant's misreporting

concealed Defendant's actions with respect to pumping of ground water, the statute did not begin to run until the concealment was revealed.

"Pursuant to the discovery rule, a cause of action does not "accrue" until a plaintiff discovers or by the exercise of reasonable diligence should have discovered that he or she has been injured by the defendant's negligent conduct." *Anson v. American Motors Corp.*, 747 P.2d 581, 584 (Ariz. App. 1987). Had Plaintiffs in this case searched the available public records, they would not have been able to discover that Defendant was removing ground water.[1] Plaintiffs assert that June 19, 2000, was the first time Defendant admitted to the actual amount of ground water it extracted. Plaintiffs' Statement of Facts, ¶ 11. Again, while Defendant objects to this paragraph, it does not deny this fact.

The Court finds that the concealment on the part of Defendant tolled the statute of limitations until June 19, 2000. Thus, the January 2001 complaint was filed within the applicable two year statute of limitations. Therefore, Defendant's Motion for Summary Judgment based on statute of limitations will be denied.

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[1] The Court notes that in their response to the motion for judgment on the pleadings, counsel for Plaintiffs argues that Plaintiffs in fact searched the public record and relied on Defendant's representations. However, because this argument of counsel is not supported by any actual evidence either in the briefing on the motion for judgment on the pleadings or in the briefing on summary judgment, the Court has not relied on this assertion.

B. JUDGMENT ON THE PLEADINGS

1. NEGLIGENCE CLAIM

To establish a cause of action for negligence, a plaintiff must show a duty, a breach of that duty, causation, and injury or damages. *Saucedo v. Salvation Army,* 24 P.3d 1274, 1278 (Ariz. App. 2001). In its Motion for Judgment on the Pleadings, Defendant moves to dismiss Plaintiffs' negligence claim based only on the duty element of a negligence action. Defendant argues that even assuming all of Plaintiffs' allegations are true, Defendant owed Plaintiffs no duty; therefore, no cause of action for negligence can be maintained.

In their response to the Motion for Judgment on the pleadings, Plaintiffs characterize their claim as one arising under A.R.S. § 45-518(A) as a claim for negligence *per se.* In their Reply, Defendant argues that Plaintiffs have failed to show that A.R.S. § 45-518(A) creates a private cause of action for negligence *per se* under the framework presented in *Tellez v. Saban,* 933 P.2d 1233, 1237 (Ariz. App. 1996).[2]

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[2] "Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. The standard of conduct required of a reasonable person may be (a) established by a legislative enactment which so provides, or (b) adopted by the court from a legislative enactment which does not so provide. A court may adopt a statute as the relevant standard of care if it first determines that the statute's purpose is in part to protect a class of persons that includes the plaintiff and the specific interest at issue from the type of harm that occurred and against the particular action that caused the harm. Violation of the statute thus stamps the defendant's conduct as negligence *per se* but will not render the defendant liable to the

This Court agrees with Defendant that Plaintiffs have failed to make any showing consistent with these cases that A.R.S. § 45-518(A) creates a private cause of action; accordingly, their negligence claim can not proceed on this basis.[3]

However, finding that Plaintiffs failed to meet the criteria in *Tellez* does not end the inquiry of whether Defendant owed Plaintiff a duty. Defendant argues that Plaintiff has no recognized property interest in future potential use of ground water citing *In re General Adjudication of all Rights of Use Water in the Gila River System and Source,* 9 P.3d 1069, 1083, ¶ 47 (Ariz. 2000) (holding "because a well owner does not own underground water, and because landowners have no legally recognized property right in potential, future groundwater use, the constitutional argument is substantively without merit")(internal citations and quotations omitted). Conversely, Plaintiffs argue that they do have a property interest in the ground water citing *Paloma Inv. Ltd. Ptns. v. Jenkins,* 978 P.2d 110, 115, ¶ 22 (Ariz. App. 1998) (holding

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plaintiff unless the violation is the legal cause of the plaintiff's injury and no other defenses negate liability." *Tellez,* 933 P.2d at 1237 (internal quotations and citations omitted). However, not all statutes establish a standard of conduct applicable in a negligence action, *Id.*

[3] The Court notes that at oral argument, Plaintiffs for the first time attempt to fit their claim under A.R.S. § 45-518(A) into a private cause of action under the *Tellez* framework. Defendant countered that Plaintiffs fail to overcome the fact that all of the duties under A.R.S. § 45-518(A) are on the Director of the Arizona Department of Water Resources. The Court will not consider arguments raised, without the benefit of briefing, for the first time at oral argument. Accordingly, the Court will not find a private cause of action under A.R.S. § 45-518(A) based on the arguments raised by Plaintiffs at oral argument.

that in general water rights are property rights, and further holding that the landowner's right to percolating ground water is a usufruct, the right to use property belonging to another). Further, citing *Farmers Inv. Co. v. Bettwy*, 558 P.2d 14, 19-20 (Ariz. 1976), Plaintiffs argue that under the doctrine of reasonable use, "the owner of lands overlying subterranean waters ... may extract such water for a reasonable, beneficial use of the land from which the same is taken," however, "percolating waters may not be used off the lands from which they are pumped if thereby others whose lands overlie the common supply are injured."[4]

Thus, based on these cases, the Court must determine whether Defendant owed a duty to Plaintiffs to not interfere with Plaintiffs use of the water. The Court finds that Defendant could only extract the water to the detriment of Plaintiffs to the extent that: 1) the water was used for the reasonable, beneficial use of Defendant's land; and 2) the water was not transported off Defendant's land.[5] Thus,

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[4] Defendant claims *Farmers Inv. Co.* is inapposite because that case dealt with the transportation of water off the land, which there is no allegation of in this case. While this may be true, the Court finds the case to be useful on the definition of reasonable use. *Farmers Inv. Co.* holds that the water can only be removed from the ground if the water, once removed, will be used for the beneficial, reasonable use of the land from which it was removed. Thus, *Farmer Inv. Co.* is helpful to the extent it defines reasonable use.

[5] The Court further notes that in considering whether Defendant extracted water for a reasonable, beneficial use of its land, normally permission to extract such water is left to the Director of the Arizona Department of Water Resources. Thus, a further issue created on duty is whether the failure to obtain the permission of the Director calls into question whether Defendant's use of the water for the land was reasonable.

Defendant did owe a duty to Plaintiffs to not remove the percolating water unless all of these conditions were met. Accordingly, the Motion for Judgment on the Pleadings on the negligence claim will be denied.

2. NUISANCE CLAIM

The substance of Defendant's Motion for Judgment on the Pleadings on Plaintiffs' nuisance claim is the same as Defendant's duty argument. Essentially, Defendant argues that because Plaintiffs have no ownership rights to the ground water, Plaintiffs cannot bring a nuisance cause of action for interference with the ground water. Citing the same cases referenced above, Plaintiffs argue that they do have an ownership interest in some form over the percolating ground water.

To state a cause of action for nuisance, a plaintiff must be able to show a condition that represents an unreasonable interference with the plaintiff's use and enjoyment of his property and causes damage. *Graber v. City of Peoria,* 753 P.2d 1209, 1211 (Ariz. App. 1988). The "unreasonable interference" is determined by the harm to the plaintiff caused by the condition, not by the conduct of the party creating the condition, *Id.*

Thus, Defendant argues that Plaintiffs in this case can not show the requisite harm for a nuisance claim because they have no right to the ground water. Again, relying on *Paloma,* this Court finds that Plaintiffs did have an interest or right in the percolating ground water. 978 P.2d at 115, ¶ 22 (holding that in general water rights are property rights, further holding that the landowners right to percolating ground water

is a usufruct, the right to use property belonging to another).[6] Accordingly, the Court finds Plaintiffs state a claim for nuisance. Therefore, Defendant's Motion for Judgment on the Pleadings on the nuisance claim will be denied.[7]

3. TRESPASS AND CONVERSION CLAIMS

Again, Defendant's Motion for Judgment on the Pleadings on Plaintiffs' trespass and conversion claims turns on Defendant's theory that Plaintiffs have no right or interest in the ground water; and, accordingly, cannot state a claim for trespass or conversion. Plaintiffs more or less concede that they can not state of claim for both trespass and conversion. However, Plaintiffs argue that Defendant's actions must amount to either trespass or conversion.

A claim for trespass involves interference with an interest in real property. *See Taft v. Ball, Ball & Brosamer,* 818 P.2d 158, 161 (Ariz. App. 1991). A claim for conversion involves

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[6] Defendant further argues that a nuisance claim must relate to a private right not a public right citing *Armory Park Neighborhood Assoc. v. Episcopal Community Servs.* 712 P.2d 914, 917 (Ariz. 1985). Defendant goes on to argue that ground water rights are public rights and not the private rights of Plaintiffs. While the Court agrees that Plaintiffs' interest in the percolating ground water beneath their land is not exclusive, the usufrust interest is private in that it only belongs to the owner of the land. Therefore, while Plaintiffs interest is not exclusive, such fact does not make it non-private.

[7] In its Reply, Defendant argues for the first time that regardless of what the case law says, the case law was preempted by the Arizona statutes. The Court will not consider arguments raised for the first time in a reply.

interference with an interest in personal property. *See Safeway Stores, Inc. v. Harrison,* 484 P.2d 208, 212 (Ariz. App. 1971). Thus, determining whether Plaintiffs have a trespass or conversion claim first requires a determination of whether Plaintiffs interest in percolating ground water is an interest in real property or personal property.

In Paloma, the Court held that, in general, water rights are property rights. 978 P.2d at 115, ¶ 22. The *Poloma* court further defined those property rights as interests in real property. *See id.* Therefore, the Court finds that Plaintiffs' interest in percolating ground water is a real property interest. Thus, Plaintiffs' conversion claim will be dismissed because Plaintiffs have alleged no interference with a personal property interest.

As to Plaintiffs' trespass claim, Plaintiffs concede that the elements of trespass in Arizona require an entry onto the real property of another. *See* Brady's Response to Abbott's Motion for Judgment on the Pleadings, pg. 10, Further, Plaintiffs concede that Defendant did not enter their land. However, Plaintiffs argue that Defendant actually took possession of their real property, *i.e.* the water. Considering the three possible ways to state of claim for trespass under Arizona law,[8] the Court finds that Plaintiffs have failed to plead a circumstance which falls within any of these possible methods of trespass. Accordingly, Plaintiffs' trespass claim will also be dismissed.

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[8] Trespass is committed when one intentionally, 1) enters land in the possession of another, or causes a thing or third person to do so; or 2) remains on the land, or 3) fails to remove from the land a thing which he is under a duty to remove. *See generally Taft,* 818 P.2d at 161; *see also* Restatement (Second) of Torts, § 158. A showing of harm is not required. *Taft,* 818 P.2d at 161.

4. INFLICTION OF EMOTIONAL DISTRESS (NEGLIGENT AND INTENTIONAL) CLAIMS

In their response to the Motion for Judgment on the Pleadings, Plaintiffs concede that, though they plead the infliction of emotional distress claims in good faith, they will not be able to meet their burden of proof on these claims. Accordingly, Plaintiffs consent to the dismissal of these claims.

C. SUMMARY JUDGMENT

Alternatively, and by separate pleading, Defendant has moved for summary judgment on Plaintiffs' claims. Part of the summary judgment motion merely incorporates by reference arguments raised in the Motion for Judgment on the Pleadings. Because the trespass, conversion, and infliction of emotional distress claims have all been resolved above, the Court will not readdress them in considering the Motion for Summary Judgment.

1. NEGLIGENCE

As indicated above, to state a cause of action for negligence, a plaintiff must show a duty, a breach of that duty, causation, and injury or damages. *Saucedo v. Salvation Army,* 24 P.3d 1274, 1278 (Ariz. App. 2001). In its Motion for Summary Judgment Defendant moves alleging that Plaintiffs can not show either the causation element or the injury element of their negligence claim.

a. CAUSATION

To show causation, Plaintiffs must show, "that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have of occurred." *Robertson v. Sixpence Inns of America, Inc.*, 789 P.2d 1040, 1047 (Ariz. 1990). Defendant contends, based on the opinions and reports of its expert, Marvin Glotfelty, that Defendant's dewatering activities had no significant or lasting impact on the aquifer the supplied Plaintiffs' property. Conversely, Plaintiffs' expert, Dr. Young, opines that Defendant's dewatering activities across the street from Plaintiffs' farm, "effectively drained the shallow perch water table beneath the [plaintiffs'] property and the adjacent surrounding area." Therefore, there is a disputed issue of fact as to whether Defendant's activities caused a decrease in Plaintiff's water supply. Accordingly, assuming Dr. Young's testimony is admissible,[9] the Court will not grant Defendant's Motion for Summary Judgment based on the causation element of negligence because of this disputed issue of fact.

b. INJURY

In additional to showing causation, Plaintiffs' must also show that they suffered an injury as a result of the alleged reduction in water. If Plaintiffs can not show any injury, then summary judgment in Defendant's favor would be appropriate.

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[9] Defendant has moved via a motion in limine to preclude the testimony of Dr. Young. The Court will address the motion in limine below.

The majority of Plaintiffs' damages evidence is presented in the form of the affidavit of James Brady. In its Response and Objections to the Bradys' Statement of Facts and Controverting Statement of Facts (pgs. 19-23) Defendant disputes every fact alleged by Mr. Brady with respect to damages.

The Court finds that, drawing all inferences in favor of the non-moving party, Mr. Brady's testimony (via the affidavit) that he used to water to water the pecan trees, that he personally observed a reduction in the water level and the amount of water, that he diverted water from other crops to save the pecan trees, and that he personally observed the roots of the pecan trees using water from the aquifer before the amount of water was reduced is sufficient to create a disputed issue of fact as to whether Plaintiffs were damaged by Defendant's dewatering activities.[10] This is true notwithstanding the fact that Defendant urges this Court to rely on the testimony of Defendant's expert, Dr. Story, who opines that with respect to the growing process of a pecan tree, Mr. Brady's testimony must be incorrect. The contradicting testimony by Dr. Story does nothing more than create a disputed issue of fact on the issue of damages. Therefore, assuming Mr. Brady's testimony is admissible, the Court will not grant summary judgment in Defendant's favor

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[10] The Court notes that at exhibit C to Plaintiffs Statement of Facts (pages 3-5), Plaintiffs give great detail about the amount of damages and the calculation of damages. However, Exhibit C is a Rule 26.1 disclosure statement signed by counsel. Such pleading is not admissible evidence to oppose a motion for summary judgment, and Defendant's have moved on the basis of no admissible evidence. Accordingly, the Court has not considered such pleading for purposes of this motion.

based on Plaintiffs' alleged failure of evidence on injury caused by Defendant's conduct.

With respect to the admissibility of Mr. Brady's testimony, and because Defendant objected to every statement in Mr. Brady's affidavit and every statement in Plaintiff's Statement of Facts, the Court will consider the statements row by row as listed in Defendant's Response and Objections. With respect to the two rows on page 19, the Court does not find Mr. Brady's affidavit testimony and his deposition testimony to be so materially different as to make his affidavit testimony inadmissable as a sham affidavit. With respect to the first row on page 20, the fact that Mr. Brady and Mr. Story have different opinions simple creates an disputed issue of fact, not a basis for granting summary judgment. Further, the fact that Mr. Brady claims to have personally witnessed the roots, makes his opinion not speculation. With respect to the second row on page 20, the Court does not find Mr. Brady's affidavit testimony and his deposition testimony to be so materially different as to make his affidavit testimony inadmissable as a sham affidavit. The Court has not relied on the last row on page 20, the first row or the second row of page 21, the row on page 22, or the row on page 23. Thus, with respect to all statements on which the Court has relied, the Court finds Mr. Brady's testimony to be admissible.

2. NUISANCE

Defendant's entire nuisance argument in its Motion for Summary Judgment is, "the Bradys have not presented any evidence that Abbott unreasonably, or otherwise, interfered with any of the Bradys' interests in their properties. This failure of proof demonstrates that their nuisance claim must fail. *Graber v. City of Peoria,* 753 P.2d 1209, 1211 (Ariz. App. 1988)." In their response, Plaintiffs never reference

their nuisance claim, instead arguing punitive damages (a topic on which Defendant did not move for summary judgment). Thus, Plaintiffs leave to the Court the task of compiling the evidence they presented to determine whether they can survive summary judgment on their nuisance claim. Defendant does not mention the nuisance claim in its reply in support of its summary judgment motion.

As indicated above, to state a cause of action for nuisance, a plaintiff must be able to show a condition that represents an unreasonable interference with the plaintiff's use and enjoyment of his property and causes damage. *Graber,* 753 P.2d at 1211. The "unreasonable interference" is determined by the harm to the plaintiff caused by the condition, not by the conduct of the party creating the condition. *Id.*

As discussed in the injury section above, the Court has found that Plaintiffs have created a disputed issue of fact as to whether they whether injured by Defendant's conduct and how much they were injured by Defendant's conduct. The same evidence which created the disputed issue of fact on the negligence claim, creates a disputed issue of fact on the nuisance claim, *i.e.* whether Defendant's actions amounted to an unreasonable interference with Plaintiffs' use of their property and damaged them. Accordingly, Defendant's Motion for Summary Judgment on Plaintiffs' nuisance claim will be denied.

3. MOTION IN LIMINE TO PRECLUDE THE TESTIMONY OF PLAINTIFF'S EXPERT, DR. YOUNG

Defendant has filed a Motion in Limine to preclude Plaintiffs' expert, Dr. Young from testifying. Defendant has objected to the portions of Plaintiffs' Statement of Facts which

reference Dr. Young's testimony, incorporating by reference its Motion in Limine. Defendant argues that for the Court to permit expert testimony *under Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993) and Fed. R. Evid. 104(a), the reliability of the testimony must be established by a preponderance of the evidence. *Daubert*, 509 U.S. at 592, n. 10.[11] Defendant argues three reasons for excluding Dr. Young's testimony for lack of reliability: 1) he is being paid on a contingency fee basis; 2) he is not a registered geologist in violation of Arizona law; and 3) his testimony is not based on applying a reliable methodology to sufficient facts or data in order to reasonably reach an opinion as required by Fed. R. Evid. 702.

With respect to Defendant's contingency fee argument, Dr. Young disputes that he is being paid on a contingency fee. Dr. Young testified at his deposition that he will bill his time at the end of the case and that he probably will not sue Plaintiffs if they fail to pay. On this record, the Court can not conclude that Dr. Young is receiving a contingency fee. Accordingly, Defendant's Motion in Limine on this basis will be denied.

With respect to the registration issue, Defendant argues that this Court must determine whether Dr. Young's testimony will be reliable based in part on Dr. Young's qualifications. Defendant argues that Dr. Young's lack of registration as a geologist shows that Dr. Young is not

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[11] *Daubert* had additional requirements for the admissibility of expert testimony, none of which were raised in Defendant's Motion in Limine.

qualified to give a reliable opinion on ground water.[12] In their response to Defendant's Motion in Limine, Plaintiffs recount Dr. Young's qualifications as a hydrologist. Defendant counters that it does not dispute Dr. Young's professional experience, instead Defendant argues that Dr. Young admitted in his deposition that he was testifying within an area covered by the Arizona geologist registration statute, and Dr. Young admitted that he was not registered. Therefore, Defendant concludes that Dr. Young's opinions are not reliable. In light of Dr. Young's undisputed extensive professional experience, the Court can not conclude that Dr. Young's failure to register with the State of Arizona makes his opinions so unreliable that he can not testify as an expert. Therefore, the Court will not preclude Dr. Young's testimony based on this argument raised in the Motion in Limine.[13]

Finally, Defendant argues that Dr. Young's testimony should be precluded because it is based on speculation and conjecture, not reliable science applied to facts. Defendant's

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[12] "'Geological practice'" means any professional service or work requiring geological education, training and experience, and the application of special knowledge of the earth sciences to such professional services as consultation, evaluation of mining properties, petroleum properties and groundwater resources, professional supervision of exploration for mineral natural resources including metallic and nonmetallic ores, petroleum and groundwater, and the geological phases of engineering investigations." A.R.S. § 32-101(B)(14)

[13] Because preclusion of Dr. Young's testimony on the basis of unreliability is the only issue before the Court, testimony the Court has decided not to preclude assuming *arguendo* for purposes of this Order only that Dr. Young is in fact violating the geologist registration statute, this Court need not reach the issue of whether Dr. Young is actually violating the statute.

basis for this portion of the motion is in large part Defendant's assertion that Dr. Young did not do an adequate investigation. In Dr. Young's deposition, which Defendant attached to its Motion in Limine, Dr. Young testified that he reviewed the Department of Water Resources file, interviewed Mr. Brady, reviewed numerous field reports prepared by Defendant, conducted a site visit, and interviewed three individuals from surrounding properties (the power company, the sewage treatment plant, and Lay's Potato Chips).[14] The Court finds that this investigation is sufficient to meet the preponderance of the evidence standard for reliability under *Daubert*. To the extent Defendant or Defendant's expert disagrees with Dr. Young's conclusions based on this investigation, such difference of opinion is a disputed issue of fact to be decided by the jury at trial. Accordingly, the Court finds Dr. Young's testimony to be reliable and will deny Defendant's Motion in Limine.

IV. CONCLUSION

Based on the foregoing,

IT IS ORDERED that Defendant's Motion in Limine to Preclude the expert testimony of Dr. Young (Doc. #65) is denied;

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[14] Defendant makes much of the fact that Dr. Young did not review the official file of the Department of Water Resources, but instead relied on a copy of the file produced by Defendant in discovery. Because the Court is confident Defendant did not alter, modify, or falsify the copies of these official documents that Defendant produced in discovery, the Court does not understand Defendant's objection to Dr. Young relying on documents provided by Defendant.

IT IS FURTHER ORDERED that Defendant's Motion for Judgment on the Pleadings (Doc. # 31) is granted in part and denied in part as follows: the motion is granted with respect to Plaintiffs' infliction of emotional distress claims, trespass claim, and conversion claim; the motion is denied with respect to Plaintiffs' negligence claim and Plaintiffs' nuisance claim.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment (Doc. #62) is denied;

IT IS FURTHER ORDERED that Plaintiffs Motion to Strike Defendant's objections to Plaintiffs' Statement of Facts (Doc. #76) is denied without prejudice, and Defendant's objections to Plaintiffs' Statement of Facts are overruled without prejudice to each party making any appropriate objections or responses to objections at trial.

DATED this 31st day of March, 2003.

/s/
James A. Teilborg
United States District Judge

APPENDIX E

RELEVANT STATUTORY PROVISIONS INVOLVED

ARIZONA STATUTES
TITLE 45 WATERS
CHAPTER 2 GROUNDWATER CODE
ARTICLE 1. ADMINISTRATION

45-401. Declaration of policy

A. The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal of groundwater is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy and welfare of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective.

B. It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state.

45-402. Definitions

In this chapter, unless the context otherwise requires:

1. "Accounting period" means the calendar year, except such other twelve-month period as may be otherwise agreed upon by the director and the owner of a farm or a district on behalf of its landowners.

2. "Active management area" means a geographical area which has been designated pursuant to article 2 of this chapter as requiring active management of groundwater or, in the case of the Santa Cruz active management area, active management of any water, other than stored water, withdrawn from a well.

3. "Animal industry use" means the production, growing and feeding of livestock, range livestock or poultry, as such terms are defined in section 3-1201. Animal industry use is included in the term and general treatment of industry in this chapter, unless specifically provided otherwise.

4. "City" or "town" means a city or town incorporated or chartered under the constitution and laws of this state.

5. "Conservation district" means a multi-county water conservation district established under title 48, chapter 22.

6. "Convey" means to transfer the ownership of a grandfathered right from one person to another.

7. "Date of the designation of the active management area" means:

(a) With respect to an initial active management area, June 12, 1980.

(b) With respect to a subsequent active management area, the date on which the director's order designating the active management area becomes effective as provided in section 45-414 or the date on which the final results of an election approving the establishment of the active management area pursuant to section 45-415 are certified by the board of supervisors of the county or counties in which the active management area is located.

8. "Exempt well" means a well having a pump with a maximum capacity of not more than thirty-five gallons per minute which is used to withdraw groundwater pursuant to section 45-454.

9. "Expanded animal industry use" means increased water use by an animal industrial enterprise on the land in use by the enterprise on June 12, 1980 or on immediately adjoining land, excluding irrigation uses.

10. "Farm" means an area of irrigated land which is under the same ownership, which is served by a water distribution system common to the irrigated land and to which can be applied common conservation, water measurement and water accounting procedures.

11. "Farm unit" means:

(a) With respect to areas outside an active management area and with respect to an active management area other than the Santa Cruz active management area, one or more farms which are irrigated with groundwater and which are

contiguous or in proximity to each other with similar soil conditions, crops and cropping patterns.

(b) With respect to the Santa Cruz active management area, one or more farms which are irrigated with water, other than stored water, withdrawn from a well and which are contiguous or in proximity to each other with similar soil conditions, crops and cropping patterns.

12. "Grandfathered right" means a right to withdraw and use groundwater pursuant to article 5 of this chapter based on the fact of lawful withdrawals and use of groundwater prior to the date of the designation of an active management area.

13. "Groundwater basin" means an area which, as nearly as known facts permit as determined by the director pursuant to this chapter, may be designated so as to enclose a relatively hydrologically distinct body or related bodies of groundwater, which shall be described horizontally by surface description.

14. "Groundwater replenishment district" or "replenishment district" means a district that is established pursuant to title 48, chapter 27.

15. "Groundwater withdrawal permit" means a permit issued by the director pursuant to article 7 of this chapter.

16. "Initial active management area" means the Phoenix, Prescott or Pinal active management area established by section 45-411, the Tucson active management area established by section 45-411 and modified by section 45-411.02 and the Santa Cruz active management area established by section 45-411.03.

17. "Integrated farming operation" means:

(a) With respect to land within an irrigation non-expansion area, more than ten acres of land that are contiguous or in close proximity, that may be irrigated pursuant to section 45-437, that are not under the same ownership and that are farmed as a single farming operation.

(b) With respect to land within an active management area, two or more farms that are contiguous or in close proximity, that collectively have more than ten irrigation acres and that are farmed as a single farming operation.

18. "Irrigate" means to apply water to two or more acres of land to produce plants or parts of plants for sale or human consumption, or for use as feed for livestock, range livestock or poultry, as such terms are defined in section 3-1201.

19. "Irrigation acre" means an acre of land, as determined in section 45-465, subsection B, to which an irrigation grandfathered right is appurtenant.

20. "Irrigation district" means a political subdivision, however designated, established pursuant to title 48, chapter 17 or 19.

21. "Irrigation grandfathered right" means a grandfathered right determined pursuant to section 45-465.

22. "Irrigation non-expansion area" means a geographical area which has been designated pursuant to article 3 of this chapter as having insufficient groundwater to provide a reasonably safe supply for the irrigation of the cultivated lands at the current rate of withdrawal.

23. "Irrigation use" means:

(a) With respect to areas outside an active management area and with respect to an active management area other than the Santa Cruz active management area, the use of groundwater on two or more acres of land to produce plants or parts of plants for sale or human consumption, or for use as feed for livestock, range livestock or poultry, as such terms are defined in section 3-1201.

(b) With respect to the Santa Cruz active management area, the use of water, other than stored water, withdrawn from a well on two or more acres of land to produce plants or parts of plants for sale or human consumption, or for use as feed for livestock, range livestock or poultry, as such terms are defined in section 3-1201.

24. "Irrigation water duty" or "water duty" means the amount of water in acre-feet per acre that is reasonable to apply to irrigated land in a farm unit during the accounting period, as determined by the director pursuant to sections 45-564 through 45-568 or as prescribed in section 45-483.

25. "Member land" means real property that qualifies as a member land of a conservation district as provided by title 48, chapter 22.

26. "Member service area" means the service area of a city, town or private water company that qualifies as a member service area of a conservation district as provided by title 48, chapter 22.

27. "Non-irrigation grandfathered right" means a grandfathered right determined pursuant to section 45-463, 45-464, 45-469 or 45-472.

28. "Non-irrigation use" means:

(a) With respect to areas outside an active management area and with respect to an active management area other than the Santa Cruz active management area, a use of groundwater other than an irrigation use.

(b) With respect to the Santa Cruz active management area, a use of water, other than stored water, withdrawn from a well, other than an irrigation use.

29. "Person" means an individual, public or private corporation, company, partnership, firm, association, society, estate or trust, any other private organization or enterprise, the United States, any state, territory or country or a governmental entity, political subdivision or municipal corporation organized under or subject to the constitution and laws of this state.

30. "Private water company" means:

(a) With respect to areas outside an active management area and with respect to an active management area other than the Santa Cruz active management area, any entity which distributes or sells groundwater, except a political subdivision or an entity which is established pursuant to title 48 and which is not regulated as a public service corporation by the Arizona corporation commission under a certificate of public convenience and necessity. A city or town is not a private water company.

(b) With respect to the Santa Cruz active management area, any entity which distributes or sells water, other than stored water, withdrawn from a well, except a political subdivision or an entity which is established pursuant to title

48 and which is not regulated as a public service corporation by the Arizona corporation commission under a certificate of public convenience and necessity. A city or town is not a private water company.

31. "Service area" means:

(a) With respect to a city or town, the area of land actually being served water, for a non-irrigation use, by the city or town plus:

(i) Additions to such area which contain an operating distribution system owned by the city or town primarily for the delivery of water for a non-irrigation use.

(ii) The service area of a city, town or private water company that obtains its water from the city pursuant to a contract entered into prior to the date of the designation of the active management area.

(b) With respect to a private water company, the area of land of the private water company actually being served water, for a non-irrigation use, by the private water company plus additions to such area which contain an operating distribution system owned by the private water company primarily for the delivery of water for a non-irrigation use.

32. "Service area of an irrigation district" means:

(a) With respect to an irrigation district which was engaged in the withdrawal, delivery and distribution of groundwater as of the date of the designation of the active management area, the area of land within the boundaries of the irrigation district actually being served water by the irrigation district at any time during the five years preceding

the date of the designation of the active management area plus any areas as of the date of the designation of the active management area within the boundaries of the irrigation district which contain an operating system of canals, flumes, ditches and other works owned or operated by the irrigation district. The service area may be modified pursuant to section 45-494.01.

(b) With respect to an irrigation district which was not engaged in the withdrawal, delivery and distribution of groundwater as of the date of the designation of the active management area:

(i) The acres of member lands within the boundaries of the irrigation district which were legally irrigated at any time from January 1, 1975 through January 1, 1980 for initial active management areas or during the five years preceding the date of the designation of the active management area for subsequent active management areas.

(ii) Any areas as of the date of the designation of the active management area within the boundaries of the irrigation district which contain an operating system of canals, flumes, ditches and other works for the withdrawal, delivery and distribution of water.

33. "Stored water" means water that is stored underground for the purpose of recovery pursuant to a permit issued under chapter 3.1 of this title.

34. "Subbasin" means an area which, as nearly as known facts permit as determined by the director pursuant to this chapter, may be designated so as to enclose a relatively hydrologically distinct body of groundwater within a

groundwater basin, which shall be described horizontally by surface description.

35. "Subsequent active management area" means an active management area established after June 12, 1980 pursuant to article 2 of this chapter.

36. "Subsidence" means the settling or lowering of the surface of land which results from the withdrawal of groundwater.

37. "Transportation" means the movement of groundwater from the point of withdrawal to the point of use.

38. "Type 1 non-irrigation grandfathered right" means a non-irrigation grandfathered right associated with retired irrigated land and determined pursuant to section 45-463, 45-469 or 45-472.

39. "Type 2 non-irrigation grandfathered right" means a non-irrigation grandfathered right not associated with retired irrigated land and determined pursuant to section 45-464.

40. "Water district" means an active management area water district that is established under title 48, chapter 28 and that has adopted an ordinance or resolution to undertake water district groundwater replenishment obligations as defined and used in title 48, chapter 28, article 7.

41. "Water district member land" means real property that qualifies as water district member land of a water district as provided by title 48, chapter 28.

42. "Water district member service area" means the service area of the city, town or private water company that

qualifies as a water district member service area of a water district as provided by title 48, chapter 28.

43. "Well" means a man-made opening in the earth through which water may be withdrawn or obtained from beneath the surface of the earth except as provided in section 45-591.01.

ARIZONE STATUTES
TITLE 45 WATERS
CHAPTER 2 GROUNDWATER CODE
ARTICLE 7. GROUNDWATER WITHDRAWAL PERMITS

45-513. Dewatering permit; definition; priorities for use of groundwater; conditions on director; duration of permit

A. Except as provided in subsection F of this section, a person who is engaged in or proposes to engage in the extraction and processing of minerals shall be issued a dewatering permit for the beneficial use of the land for mineral extraction, for metallurgical processing and for compliance with applicable environmental controls. For purposes of this section, "dewatering" means the withdrawal of groundwater from pits, from in, under and around ore bodies in proximity to pits and from underground workings. Dewatering does not include process water and tailing water recovered from or pumped from beneath tailing ponds.

B. A person who is engaged in or proposes to engage in the extraction and processing of minerals may recover from or pump from beneath tailing ponds process water and tailing water without obtaining a permit under this article, if that water is recycled into the extraction or metallurgical process or is withdrawn to comply with applicable environmental controls. Such a person may not drill or cause to be drilled a well for the purpose of pumping or recovering process water or tailing water from beneath tailing ponds for recycling into the extraction or metallurgical process without first filing a notice of intention to drill under section 45-596.

C. Groundwater withdrawn pursuant to a dewatering permit shall be used in the following order of priority:

1. To meet mineral extraction, metallurgical processing and environmental control requirements of the permittee.

2. To a city, town, private water company or farm and any other person whose respective ability to withdraw groundwater has been adversely affected by a dewatering permit. Such water shall be equitably allocated by the director without costs but subject to the conditions set forth in subsection D of this section among such persons adversely affected by such dewatering. A person who receives an allocation of water under this paragraph shall reduce his groundwater withdrawals by the amount of water he receives under this paragraph. A person receiving water under this paragraph does not thereby forfeit or abandon his right to withdraw groundwater.

3. For municipal, commercial, domestic and industrial needs of communities and residential areas directly related to the mineral extraction and metallurgical processing operation of the permittee.

4. To irrigate land owned or controlled by the permittee which is entitled to the use of groundwater for irrigation.

5. To the director for such distribution as will best achieve the goals and purposes of the management plan for the active management area.

6. For such other legal purpose as the permittee elects.

D. Groundwater made available to the director for distribution or allocation under this section is subject to the following conditions:

1. The permittee shall deliver the groundwater to the boundary of his property but shall not be obligated to deliver it further.

2. The permittee shall not be required to treat the chemical quality of the groundwater for distribution or allocation.

3. The permittee shall not be required to make the groundwater available if dewatering ceases, or if all or any portion of the groundwater is needed for a purpose having a higher priority as specified in subsection C of this section.

4. The person actually using the groundwater distributed or allocated by the director shall be responsible for paying any withdrawal fees required under section 45-611.

5. If the director sells water, proceeds shall be applied as follows:

(a) To cover costs, if any, of the director in delivering water to other users.

(b) To cover the permittee's cost in transporting water to the boundary of his property.

(c) To the active management area for general purposes as determined by the director.

E. A permit issued pursuant to this section shall be granted for a period of up to fifty years, subject to renewal under the same criteria used in granting the original permit.

F. Beginning January 1 of the calendar year following the year in which a groundwater replenishment district is required

to submit its preliminary plan pursuant to section 45-576.02, subsection A, paragraph 1, and except for an application to renew a dewatering permit, on receiving a permit application the director shall not issue a permit for a well in the district unless at the time the application for the permit is filed:

1. The director has determined that the district's plan for operation is consistent with achieving the management goal, according to section 45-576.03, subsection E, and the designation has not expired.

2. The master replenishment account, as established in section 45-858.01, does not have a debit balance in an amount in excess of the amount allowed under section 45-576.01, subsection A, paragraph 3.

45-518. Temporary dewatering permit; extensions; emergency temporary dewatering permit; conditions for issuance

A. The director may issue a temporary permit to a person to withdraw groundwater for dewatering purposes if the director determines that:

1. Dewatering is necessary for the construction or the structural integrity of improvements on the land from which the groundwater is proposed to be withdrawn.

2. Dewatering is consistent within the management plan for the active management area.

3. The groundwater to be withdrawn pursuant to the permit will be used beneficially by a person who would otherwise be permitted to use groundwater under this title, including the applicant to the extent the applicant could otherwise withdraw and use groundwater under this title, unless the applicant demonstrates that it would be infeasible for any such person to put the groundwater to a beneficial use.

4. Dewatering will not harm any person permitted to withdraw or use groundwater under this title.

B. Subject to subsection C of this section, a permit issued pursuant to this section may be issued for a period of up to five years and may be extended for additional five year periods if the director determines that the conditions specified in subsection A of this section continue to apply.

C. The director shall monitor withdrawals of groundwater pursuant to a temporary dewatering permit or extension and

shall terminate the permit if the conditions specified in subsection A or B of this section no longer apply.

D. During the period in which an application for a temporary dewatering permit is under consideration by the director pursuant to this article, the director may issue an emergency temporary dewatering permit to the applicant if the director determines that immediate dewatering is necessary for the construction or structural integrity of improvements on the land from which the groundwater is proposed to be withdrawn, that property damage or inordinate expense or delay would result if the applicant is not allowed to begin dewatering immediately and that dewatering will not harm any person permitted to withdraw or use groundwater under this title. The director may issue an emergency temporary dewatering permit without complying with section 45-523. The director shall monitor withdrawals of groundwater pursuant to the emergency temporary dewatering permit and shall terminate the permit if the conditions that gave rise to its issuance no longer apply or if a temporary dewatering permit is issued or denied.

ARIZONE STATUTES
TITLE 45 WATERS
CHAPTER 2 GROUNDWATER CODE
ARTICLE 8. TRANSPORTATION OF GROUNDWATER

45-541. Transportation within a sub-basin

A. Groundwater which is withdrawn pursuant to a grandfathered right or a groundwater withdrawal permit or from an exempt well may be transported without payment of damages within a sub-basin of an active management area, subject to the limitations on location of use in sections 45-472 and 45-473.

B. Groundwater which is withdrawn by a city, town or private water company within its service area may be transported without payment of damages within its service area within a sub-basin of an active management area.

C. Groundwater which is withdrawn by a city, town or private water company within its service area may be transported pursuant to a delivery contract authorized by section 45-492, subsection C, without payment of damages, within a sub-basin of an active management area.

D. Groundwater which is withdrawn by an irrigation district within its service area may be transported without payment of damages within its service area within a sub-basin of an active management area.

45-545. Damage rules applicable to all transportations of groundwater

A. In active management areas and in areas outside of active management areas, in any action to recover damages, neither injury to nor impairment of the water supply of any landowner shall be presumed from the fact of transportation.

B. In determining whether there has been injury and the extent of any injury, the court shall consider all acts of the person transporting groundwater toward the mitigation of injury including:

1. Retirement of land from irrigation.

2. Discontinuance of other preexisting uses of groundwater.

3. Water conservation techniques.

4. Procurement of additional sources of water which benefit the active management area, sub-basin or landowners within the active management area or sub-basin.

C. The court may award reasonable attorney fees, expert witness expenses and fees and court costs to the prevailing party.

ARIZONE STATUTES
TITLE 45 WATERS
CHAPTER 2 GROUNDWATER CODE
ARTICLE 12. ENFORCEMENT

45-633. Inspections, investigations and audits

A. The director or the director's authorized representative may enter at reasonable times upon private or public property where a well, including a well under construction or a well not used to withdraw groundwater or another facility for the withdrawal, transportation or use of groundwater is located and the owner, manager or occupant of the property shall permit such entry to:

1. Inspect a well, including a well under construction or a well not used to withdraw groundwater, or another facility for the withdrawal, transportation or use of groundwater that is subject to this chapter.

2. Obtain factual data or access to records required to be kept under section 45-632.

3. Ascertain compliance with this chapter.

B. Inspections and investigations under subsection A of this section shall be upon reasonable notice to the owner, manager or occupant of the property unless reasonable grounds exist to believe that such notice would frustrate the enforcement of this chapter or where entry is sought for the sole purpose of inspecting water measuring devices required pursuant to section 45-604. The director shall adopt rules for conducting inspections, examining records and obtaining warrants pursuant to this section. The director may apply for and obtain warrants. If warrants are required by law, the

director shall apply for and obtain warrants for entry and inspection to carry out the administrative and enforcement purposes of this chapter.

C. The director may require a person who is required to keep records under section 45-632 to appear, at reasonable times and upon reasonable notice, at the director's office and produce such records and information as are specified in the notice to determine whether the records and annual reports required by section 45-632 are complete, true and correct. The director shall audit the records of a sufficient number of persons under this subsection to ensure general compliance with this chapter.

D. The director shall provide a written report of each inspection, investigation and audit under this section to the person subject to such action.

45-634. Cease and desist order; temporary cease and desist order; hearing; injunctive relief

A. Except as provided by subsection B of this section, if the director has reason to believe that a person is violating or has violated a provision of this chapter or a permit, rule or order issued or adopted pursuant to this chapter, the director may give the person written notice that the person may appear and show cause at an administrative hearing why the person should not be ordered to cease and desist from the violation.

B. If the director finds that a person is constructing or modifying a well and the person does not hold a well driller's or single well license pursuant to section 45-595 or has not obtained the necessary authority to construct or modify the well pursuant to article 7 of this chapter or section 45-596, 45-597, 45-598 or 45-834.01, the director may issue a temporary order for the person to cease and desist the construction or modification pending final action by the director pursuant to subsection C of this section. The order shall include written notice to the person of the date, time and place where the person may appear at an administrative hearing to show cause why the temporary order should be vacated. The hearing shall be held within fifteen days of the date of the order unless the person consents to a longer period.

C. The decision and order of the director under subsections A and B of this section may take such form as the director determines to be reasonable and appropriate and may include a determination of violation, a cease and desist order, the recommendation of a civil penalty and an order directing that positive steps be taken to abate or ameliorate any harm or damage arising from the violation. The person affected may seek judicial review of the final decision of the director as

provided in section 45-114, subsection B in the superior court in the county in which the violation is alleged to have occurred.

D. If the person continues the violation after the director has issued a final decision and order pursuant to subsection C of this section or a temporary order pursuant to subsection B of this section, the director may apply for a temporary restraining order or preliminary or permanent injunction from the superior court according to the Arizona rules of civil procedure. A decision to seek injunctive relief does not preclude other forms of relief or enforcement against the violator.

E. Section 45-114, subsections A and B govern administrative proceedings, rehearing or review and judicial review of final decisions of the director under this section.

45-635. Violation; civil penalties

A. A person who is determined pursuant to section 45-634 to be in violation of this chapter or a permit, rule, regulation or order issued or adopted pursuant to this chapter may be assessed a civil penalty in an amount not exceeding:

1. Except as provided in paragraph 3 of this subsection, one hundred dollars per day of violation not directly related to illegal withdrawal, use or transportation of groundwater.

2. Ten thousand dollars per day of violation directly related to illegal withdrawal, use or transportation of groundwater.

3. In the Santa Cruz active management area, ten thousand dollars per day of violation for a violation of an applicable conservation requirement established by the director pursuant to article 9 of this chapter for the withdrawal of water, other than stored water, from a well or the distribution or use of water, other than stored water, withdrawn from a well.

B. An action to recover penalties under this section shall be brought by the director in the superior court in the county in which the violation occurred.

C. In determining the amount of the penalty, the court shall consider the degree of harm to the public, whether the violation was knowing or wilful, the past conduct of the defendant, whether the defendant should have been on notice of the violation, whether the defendant has taken steps to cease, remove or mitigate the violation and any other relevant information.

D. All civil penalties assessed pursuant to this section shall be deposited, pursuant to sections 35-146 and 35-147, in the state general fund.

45-636. Violation; classification

A. Unless otherwise specified, a person who knowingly violates or refuses to comply with a provision of this chapter or a permit, rule, regulation or order issued or adopted pursuant to this chapter is guilty of a class 2 misdemeanor. A person who, after notice of violation, continues in violation of a provision of this chapter or a permit, rule, regulation or order issued or adopted pursuant to this chapter is guilty of a separate offense for each day of violation.

B. A person who knowingly falsifies or renders inaccurate a measuring device required to be installed or maintained under this chapter is guilty of a class 6 felony.

C. A person who knowingly and intentionally withdraws or uses groundwater in violation of this chapter is guilty of:

1. A class 6 felony if the amount of groundwater illegally withdrawn or used is one thousand acre-feet or more.

2. A class 1 misdemeanor if the amount of groundwater illegally withdrawn or used is more than one hundred acre-feet but less than one thousand acre-feet.

3. A class 3 misdemeanor if the amount of groundwater illegally withdrawn or used is one hundred acre-feet or less.

(2)

No. 06-117

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The
Supreme Court of the United States

ERNEST EUGENE BRADY and MARRITTA KAY BRADY, husband and wife; JAMES DEAN BRADY, a single man; FLOSSIE MARIE BRADY, a single woman,

Petitioners,

vs.

ABBOTT LABORATORIES, an Illinois corporation; ROSS PRODUCTS DIVISION OF ABBOTT LABORATORIES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court should deny the Bradys' Petition because the Bradys, who asserted only state common law claims in a case removed to federal court on the basis of diversity jurisdiction, have now asserted for the first time on appeal federal issues for which the Bradys lack standing and statutory claims that they expressly disclaimed in the court of appeals?

Whether this Court should deny the Bradys' Petition because the Ninth Circuit properly applied the common law of Arizona?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent Abbott Laboratories, an Illinois corporation, has the following parent corporations:

None.

The following publicly held companies own 10% or more of the stock in Respondent Abbott Laboratories:

None.

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STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

Abbott Laboratories, Inc. ("Abbott") responds to the procedural history set out by the Bradys because they failed to include several important procedural facts in their Petition. Pursuant to Rule 15(2), Rules of the Supreme Court, Abbott is required to identify misstatements in the Petition. These omitted facts are material because they establish that this case raises no federal question, that the Bradys expressly waived in the Ninth Circuit most of the arguments they now make in their Petition, and that the other arguments were raised for the first time in the Petition.

First, the Bradys asserted only common law tort claims in their complaint and amended complaint.[1] The Bradys failed to assert a statutory claim under the Arizona Groundwater Code.[2]

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[1] The Bradys asserted common law claims for negligence, nuisance, trespass, conversion, and negligent and intentional affliction of emotional distress seeking compensatory and punitive damages. Only the common law negligence and nuisance claim went to trial because the District Court dismissed the other claims prior to trial.

[2] The Bradys assert in their Petition that Abbott alleged it was immune from liability under the doctrine of reasonable use and under A.R.S. § 45-541. The Bradys' statements are wrong. Abbott argued that the Bradys failed to allege a statutory action under the Groundwater Code. The Code expressly provides that an action may be brought if a person transports groundwater across a sub-basin boundary. Abbott pointed out that the Bradys failed to bring an action under this section because the groundwater pumped by Abbott did not cross a sub-basin boundary.

Second, this action was filed by the Bradys in Pinal County Superior Court. Abbott removed the case to the United States District Court based on diversity jurisdiction under 28 U.S.C. § 1332. No federal question of jurisdiction has ever existed.

Third, on November 9, 2005, before oral argument, the Ninth Circuit issued an order directing the parties to address whether the Ninth Circuit should certify to the Arizona Supreme Court 1) whether A.R.S. § 45-518(A) includes an implied private right of action for damages, and 2) whether the statute includes a right to the maintenance of a groundwater basin's water table at any specified height. [Appendix 1, Order dated November 9, 2005] During oral argument, the Bradys' counsel expressly asked the Ninth Circuit not to certify any issues to the Arizona Supreme Court and also expressly disclaimed any reliance on any statutory claim under the Arizona Groundwater Code.[3] *Brady v. Abbott Laboratories*, 433 F.3d 679, 681 n.1 (9th Cir. 2005).

On December 29, 2005 the Ninth Circuit reversed the District Court and remanded with directions to enter judgment for Abbott. *Id.* at 683. The Court only addressed

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[3] Footnote 1 of the Ninth Circuit's Opinion states in part as follows:

> We note that the Bradys bring only common law tort claims. At oral argument, they expressly disclaimed any reliance on any statutory claim under the Arizona Groundwater Code.

Id.

the first of four issues[4] raised on appeal by Abbott, finding that issue dispositive. *Id.* at 680-81.

II. STATEMENT OF THE FACTS

A. ABBOTT'S CONSTRUCTION ACTIVITIES

Abbott's property is located in Pinal County, Arizona. On this property, Abbott operates a facility that manufactures baby formula. Abbott's property is located across the Maricopa Highway from the Bradys' properties. Both the

[4] On appeal, Abbott raised four issues:

1. Did the District Court err by allowing the Bradys to pursue common law negligence and nuisance claims when Arizona law provides that Abbott may withdraw groundwater to make reasonable use of its property without incurring liability to neighboring landowners?
2. Did the District Court err by granting summary judgment, *sua sponte*, for the Bradys tolling the applicable statute of limitations when the Bradys had actual knowledge of the facts supporting their causes of action more than two years before filing suit?
3. Did the District Court err in awarding compensatory damages for lost profits when the Bradys failed to prove their damages with sufficient certainty as required by Arizona law, and the evidence demonstrated the Bradys never made a profit selling pecans?
4. Did the District Court err by awarding punitive damages when the Bradys failed to show that Abbott consciously disregarded a substantial risk of tremendous harm to the Bradys?

Because the Ninth Circuit did not reach three of the issues raised, even if this Court granted the Bradys' Petition and subsequently reversed the Ninth Circuit, the Bradys' request that the Court "affirm the District Court's Judgment," Petition at 20, is inappropriate. In that event, the case should be remanded to the Ninth Circuit to address the remaining issues raised by Abbott.

Bradys' properties and Abbott's property are located entirely within the Eloy Sub-Basin of the Pinal Active Management Area.

In 1987 Abbott expanded its manufacturing facility by constructing an addition. The project included digging an excavation to construct a basement. Abbott applied for and received an emergency dewatering permit from the Arizona Department of Water Resources ("ADWR") to remove groundwater and prevent it from entering the excavation. In its permit application, Abbott sought approval to remove a total of 2.07 acre-feet of water from the aquifer. Abbott encountered more water than expected when excavation work began. Abbott continued to pump from the excavation to keep it free of water during construction but did not seek an amendment of its permit to authorize the increased quantity of water being pumped. This was an oversight by Abbott and its contractors.

Abbott pumped groundwater from the excavation site until February 3, 1998. Abbott later filed a groundwater withdrawal and use report ("Annual Report") with ADWR, incorrectly stating that Abbott had not withdrawn groundwater during 1997. In 1999, Abbott did not file an Annual Report to document the quantity of water it pumped during construction in January and February, 1998, another oversight by Abbott.

During the first three months of construction, Abbott discharged the groundwater into an on-site retention basin. On November 3, 1997, Abbott redirected the discharge line to a roadside ditch at the front of Abbott's property. Water was allowed to flow into this ditch until it percolated back into the ground. The Bradys presented no evidence that Abbott transported the water for use at any

other location or that the discharged water ever crossed the Eloy Sub-Basin boundary.

B. THE BRADYS AND THEIR PROPERTIES

James Brady and his mother, Flossie Brady, own a house and approximately 25 acres of adjacent farmland in Pinal County. James and Flossie Brady are partners in Brady and Brady Farms, under which James Brady farmed the 25 acres adjacent to their home.

Gene Brady and his wife, Marritta Brady, own a separate house and lot adjacent to James and Flossie Brady's property. Gene and Marritta Brady have five pecan trees for personal use in their yard. Gene and Marritta Brady have never raised crops for commercial purposes on their property.

Both Gene and James Brady have "exempt" wells on their respective properties, as defined by A.R.S. § 45-402(8). These wells may be used only for domestic purposes and for watering up to two acres of land. A.R.S. § 45-454.

Although both James and Gene Brady are lifelong farmers, prior to 1987 neither had grown pecan trees for commercial purposes. In 1987, James Brady planted a pecan orchard on approximately ten acres of the farmland he owned with Flossie Brady. James Brady continued to raise other crops on the remaining 15 acres.

C. ADWR'S AUDIT OF ABBOTT'S GROUNDWATER PUMPING

In March 2000, more than two years after Abbott finished dewatering and James Brady learned of Abbott's activities, the Bradys complained to ADWR about Abbott's pumping. In response to these complaints, ADWR audited Abbott's 1997 and 1998 groundwater pumping activities.

On June 19, 2000, Abbott filed its response to the ADWR audit, estimating that Abbott withdrew approximately 122 acre-feet of groundwater during construction. Abbott explained the basis for its estimate, noting that the groundwater pumping rate was derived from a standard calculation methodology and the information it had available. Abbott documented the basis for its estimates with attachments, including published data and copies of daily field reports prepared by Abbott's construction team.

After submitting the response, Abbott resolved all regulatory issues with ADWR by entering into a Stipulation and Consent Order on September 6, 2000. Abbott then paid a fine of $6,508.50 and filed a revised Annual Report for 1997 and an original Annual Report for 1998.

REASONS FOR DENYING THE PETITION

I. THE BRADYS EXPRESSLY DISCLAIMED AND FAILED TO RAISE THE CLAIMS NOW ASSERTED IN THEIR PETITION.

Ordinarily, this Court does not decide questions not raised or resolved in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234, 665 S.Ct. 1399, 1401 (1976). Only in exceptional ~~cases will~~ this Court do so. *Lawn v. United*

States, 355 U.S. 339, 362 n.16, 78 S.Ct. 311, 324 (1958) (holding "[o]nly in exceptional cases will this Court review a question not raised in the court below"); *State of California v. Taylor*, 353 U.S. 553, 557 n.2, 77 S.Ct. 1037, 1040 n.2 (1957) (refusing to address contentions that the Court of Appeals held had been waived because the issues were not briefed and not mentioned in oral argument); *Duignan v. United States*, 274 U.S. 195, 199-200, 47 S.Ct. 566, 568 (1927) (denying review of constitutional question where the issue was "not pressed or passed upon below").

Exceptional circumstances have been found on very limited occasions. This Court has previously found "exceptional" the following circumstances: where an earlier decision was based on a misapprehension of federal constitutional law; where an important issue is reoccurring; and where changes in fact or law have supervened since the decree was entered below. *See, e.g., United States v. Mendenhall*, 446 U.S. 544, 552 n.5, 100 S.Ct. 1870, 1876 n.5 (1980) (finding exceptional circumstances permitting consideration where the determination of a Fourth Amendment seizure issue rested "on a serious misapprehension of federal constitutional law," the determination of the question was "essential to the correct disposition of the other issues in the case," the evidentiary record in the trial court was "adequate to permit consideration of the contention," and the material facts were "not disputed."); *Carlson v. Green*, 446 U.S. 14, 17 n.2, 100 S.Ct. 1468, 1471 n.2 (1980) (finding exceptional circumstances to consider whether a remedy was directly available under the Constitution where the respondent did "not object," the issue was "squarely presented and fully briefed," the issue was an "important, recurring issue," and the issue was "properly raised in another petition for certiorari being held pending

disposition of this case"); *Watts, Watts & Co. v. Unione Austrialia Di Navigazlione*, 248 U.S. 9, 20, 39 S.Ct. 1, 2 (1918) (finding justice required the court to consider the "changes in fact and in law which have supervened since the decree was entered below."). The Bradys have failed to assert any exceptional circumstances and no such circumstances exist.

In this case, the Bradys seek review of the Ninth Circuit's decision based on arguments that they expressly disclaimed in the Ninth Circuit. Specifically, the Bradys petition this Court for a Writ of Certiorari based in part on the assertion that the 1980 Arizona Groundwater Code provides a private cause of action.[5] The Bradys, however, filed their complaint against Abbott asserting only common law claims and never amended their complaint to add a private cause of action under the Code.[6] The Bradys never attempted to assert a statutory claim under the Arizona Groundwater Code in any pretrial proceeding or brief, at trial, or in any post trial briefing. On appeal to the Ninth Circuit, the Bradys again never attempted to assert a statutory cause of action under the Arizona Groundwater Code. On the contrary, prior to oral argument, the Ninth Circuit specifically requested that the parties be prepared to address whether that court should certify to the Arizona Supreme Court the question of whether Section 45-518(A) of the Arizona Revised Statutes, the precise statutory section now relied on by the Bradys in their Petition to this Court, includes an implied private right of action for damages.[7] At oral argument, counsel for

[5] Petition at 17.

[6] Appendix B to Petition at 8a, 10a n.1.

[7] Ninth Circuit Order filed November 9, 2005 at Appendix 1 hereto.

the Bradys expressly stated that they were bringing only common law claims:

> We note the Bradys bring only common law tort claims. At oral argument they expressly disclaimed reliance on any statutory claim under the Arizona Groundwater Code. Thus, the question of whether a private right of action for negligence *per se* can be implied under Ariz. Rev. Stat. § 45-518(A) is not before us.

Brady, 433 F.3d at 671 n.1. Not only did the Bradys never raise these statutory issues, but they refused the Ninth Circuit's invitation to do so.

After specifically disclaiming any reliance on the 1980 Groundwater Code, the Bradys now ask this Court to accept their petition and reverse the Ninth Circuit on that very ground. These circumstances are far from those "exceptional" circumstances required to justify granting the Bradys' Petition. Their Petition should thus be denied.

The Bradys also argue that the Petition should be granted on the ground that the Ninth Circuit's holding applying the doctrine of reasonable use conflicts with the provisions of the 1980 Arizona Groundwater Code.[5] This contention is wholly in error, as discussed below, and furthermore was raised for the first time at the eleventh hour. Abbott maintained from the outset of this case that the reasonable use doctrine is determinative of the common law claims asserted by the Bradys. Despite several opportunities to do so, the Bradys never argued that the doctrine conflicted with the Code before trial, at trial, or in any post trial brief. Indeed, the first time the Bradys

[5] Petition at 13.

raised this argument was in their petition to the Ninth Circuit to reconsider its reversal of the District Court. In addition to the plain error of the argument itself, it is untimely, and the Bradys have set forth no "exceptional circumstances" to justify this Court's grant of their Petition.

The Bradys also argue for the first time that federal reserved groundwater rights holders have somehow been denied "equal protection of their State's Groundwater Code"[9], presumably to attempt to gain the Court's attention by using Constitutional buzz words. This new argument, however, was never raised before at any time in this litigation. The Bradys point to no "exceptional" circumstances justifying review of this newly asserted issue. Unlike other cases in which this Court has found that such exceptional circumstances exist, the arguments asserted by the Bradys and the decisions rendered by both the trial court and the Court of Appeals were based solely on the law of the State of Arizona. *Cf. Mendenhall*, 446 U.S. at 552 n.5, 100 S.Ct. at 1876 n.5. No misapprehension of federal law, constitutional or otherwise, exists, and no change in the law has arisen while the appeal was pending. The Arizona State statutory provisions the Bradys now seek to rely on have been in effect for 25 years. In fact, this Court, "for want of a substantial federal question," dismissed an appeal by the Town of Chino Valley from the Arizona Supreme Court's decision in *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324 (Ariz. 1981) ("*Chino Valley II*"), wherein the Arizona Supreme Court held the 1980 Groundwater Code constitutional.

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[9] Petition at i.

Town of Chino Valley, v. City of Prescott, 457 U.S. 1101 (1982). This is one of the primary cases the Bradys rely upon in their Petition. Because *Chino Valley II* raised no substantial federal questions, this case, in which only Arizona common law claims were asserted, likewise raises no substantial federal question. The Petition should be denied for these reasons.

II. THE BRADYS DO NOT HOLD FEDERAL RESERVED WATER RIGHTS, AND THEY LACK STANDING TO ASSERT SUCH RIGHTS ON BEHALF OF OTHERS.

The Bradys make repeated references to "federal reserved groundwater rights holders" in their Petition.[10] They insinuate that they hold such rights without ever explaining the basis for such a claim or offering any facts to support it. In fact, the Bradys do not hold federal reserved groundwater rights. Furthermore, they lack standing to assert such rights. For these reasons, the Bradys' unfounded arguments relating to federal reserved water rights should be rejected by this Court.

A. THE FEDERAL RESERVED WATER RIGHTS DOCTRINE DOES NOT APPLY TO PRIVATE LANDS SUCH AS THOSE OWNED BY THE BRADYS.

The federal reserved water rights doctrine was first announced by this Court in *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207 (1908). In *Winters*, the Court held that the United States had impliedly reserved water to

[10] Petition at 7, 12-14, 19 and 20-21.

provide for the future needs of Native Americans occupying the Fort Belknap Indian Reservation in Montana. *Id.*, 207 U.S. at 577, 28 S.Ct. at 212. The Court upheld the "power of the [federal] government to reserve the waters and exempt them from appropriation under the state laws." *Id.*

In later cases, the Court applied this doctrine to other types of federal reservations in addition to Indian reservations. For example, in *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468 (1963), the Court held that the doctrine "was equally applicable to other federal establishments such as National Recreation Areas and National Forests." *Id.*, 373 U.S. at 601, 83 S.Ct. at 1498. In *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062 (1976), the Court applied the doctrine to Devil's Hole National Monument, confirming the United States' intention to reserve sufficient water to preserve a rare fish found only within the monument. *Id.*, 426 U.S. at 141, 96 S.Ct. at 2071. Finally, in *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012 (1978), the Court applied the doctrine to a National Forest. In all of these cases, the Court held this doctrine was applicable only to federal reservations of land held in federal ownership. As *Cappaert* explains, "*when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose*, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert*, 426 U.S. at 138, 96 S.Ct. at 2069 (emphasis added).

The Bradys' property is undisputedly private land, not a federal reservation withdrawn from the public domain. No evidence in the record of this case suggests that this land was *ever* reserved by the federal government for any purpose, much less that it might still qualify as a federal

reservation or otherwise be entitled to claim a federal reserved water right. Accordingly, the Bradys have no basis for asserting federal reserved water rights on their own behalf.

B. THE BRADYS LACK STANDING TO ASSERT FEDERAL RESERVED WATER RIGHTS ON BEHALF OF PARTIES NOT BEFORE THIS COURT.

Because the Bradys are ***not*** themselves holders of federal reserved groundwater rights, they do not have standing to raise these issues. As such, their Petition should be denied.

This Court has recognized standing as "'perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 607 (1990) (quoting *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324 (1984)) (alterations in original). In part, the legal requisite of standing requires that the litigant have a "personal stake" in the position it advances, holding "[a] federal court cannot 'pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights *of litigants in actual controversies.*'" *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 702 (1962) (quoting *Liverpool, N.Y. & P. Steamship Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 355 (1885) (emphasis added)). The burden is on the party seeking jurisdiction over the question presented to establish, by reference to facts "affirmatively" established "in the record" that the person "'is a proper party to invoke judicial resolution of the dispute.'" *FWP/PBS, Inc.*,

493 U.S. at 231, 110 S.Ct. at 608 (1990) (quoting *Warth v. Seldin*, 422 U.S. 490, 518, 95 S.Ct. 2197, 2215 (1975); *King Bridge Co. v. Otoe County*, 120 U.S. 225, 226, 7 S.Ct. 552, 552 (1887); *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511 (1884)).

Under this doctrine, "[o]rdinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson*, 346 U.S. 249, 255, 73 S.Ct. 1031, 1034 (1953) (holding "[a]part from the jurisdictional requirement [of standing], this Court has developed a complementary rule of self-restraint for its own governance . . . which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others"). This Court has set forth the following rationales for declining to resolve a controversy on the basis of the rights of third parties that are not part of the litigation: (1) that "courts should not adjudicate such rights unnecessarily"; (2) the holders of such rights may either "wish [not] to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not" and; (3) the holders of such rights themselves are usually "the best proponents of their own rights." *Singleton v. Wulff*, 428 U.S. 106, 114, 96 S.Ct. 2868, 2874 (1976). However, the Court will make an exception to this rule *if* "the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is *not unnecessary* in the sense that the right's enjoyment will be unaffected by the outcome of the suit . . . [and where] the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Id.* (emphasis added); *see also Chaplin &*

Drysdale v. United States, 491 U.S. 617, 109 S.Ct. 2646 (1989).

Here, the Bradys can neither establish that they have standing individually to assert federal reserved groundwater rights nor that the articulated exception can be applied in order for them to properly assert those rights on behalf of third parties who are not litigants in this action. No basis exists to apply the exception to the ordinary rule of standing for asserting these third party rights because those rights are expressly protected under Arizona law. *See In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999) (*"Gila River III"*).

Although this Court has not had occasion to address the question of whether the reserved water right doctrine extends to groundwater, the Arizona Supreme Court did so in *Gila River III*. In *Gila River III*, the court addressed two questions. First, the court concluded that the reserved water rights doctrine does extend to groundwater. *Id.*, 989 P.2d at 748. The court then determined that to the extent Arizona's state groundwater laws do not provide sufficient protection for federal reserved groundwater rights, the federal reservation will be entitled to invoke federal law to protect the right. Specifically, the court held that "once a federal reservation establishes a reserved right to groundwater, it may invoke federal law to protect its groundwater from subsequent diversion to the extent such protection is necessary to fulfill its reserved right." *Id.*, 989 P.2d at 750. As a result, even if the doctrine of reasonable use, as applied in the Opinion below, could pose a threat to the legitimate holder of a federal reserved groundwater right, that holder would be entitled to the greater protection of federal law to the extent necessary to fulfill the right.

Therefore, even if the Bradys had any basis for asserting reserved water right claims on behalf of others, the Opinion of the Ninth Circuit in this case poses no threat to legitimate holders of such rights. Accordingly, assertion of such rights in the Petition provides the Bradys no basis for relief from this Court.

III. THE BRADYS' PETITION PRESENTS QUESTIONS OF STATE LAW.

Unless a question of state law is so intertwined with a Federal Constitutional issue as to require the complete disposition of the case by the Supreme Court, this Court will normally decline to decide questions of state law. *See, e.g., Huddleston v. Dwyer*, 322 U.S. 232, 64 S.Ct. 1015 (1944); *Helvering v. Stuart*, 317 U.S. 154, 63 S.Ct. 140 (1942); *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 62 S.Ct. 1173 (1942). This Court generally will not disturb the judgment of a Court of Appeals on an issue that is heavily dependent on an analysis of state law in light of its recognition that federal court judges who deal regularly with questions of state law in their respective districts and circuits are in a better position to determine how state courts would be inclined to decide state law issues. *See, e.g., UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358, 119 S.Ct. 1380 (1999); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448 (1979). Thus, where the lower court's decision is reasonable and where no "plain error" exists, the Supreme Court has generally held that acceptance of the conclusions of the Court of Appeals is necessary. *United States v. Durham Lumber Co.*, 363 U.S. 522, 80 S.Ct. 1282 (1960); *Spiegel's Estate v. C.I.R.*, 335 U.S. 701, 69 S.Ct. 301 (1949).

The Bradys' positions below as well as the new arguments asserted by the Bradys in their Petition to this Court are all based on interpretation of state law. Indisputably, the Bradys asserted only state common law claims. Further, examination of the questions presented to this Court for review makes abundantly clear that the Bradys only address interpretation of the Arizona Groundwater Code and its purported effect on the Arizona common law doctrine of reasonable use.

As discussed below, the Bradys have set forth no plain error, and the Court of Appeals' determination is clearly a correct and reasonable interpretation of State law on this issue. Accordingly, the Court should decline to review this case.

IV. THE NINTH CIRCUIT CORRECTLY RULED THAT UNDER ARIZONA'S COMMON LAW DOCTRINE OF REASONABLE USE ABBOTT COULD PUMP GROUNDWATER TO MAKE REASONABLE USE OF ITS PROPERTY WITHOUT INCURRING LIABILITY TO THE BRADYS.

The Ninth Circuit correctly applied Arizona's "doctrine of reasonable use," governing landowners' rights to percolating groundwater underneath their property. Under this doctrine, Abbott could withdraw percolating groundwater without incurring liability to neighboring property owners whose groundwater supplies are diminished so long as the water was taken to make beneficial use of Abbott's property. The Bradys, on the other hand, have no right to maintain a static level of groundwater beneath their property.

In 1953, the Arizona Supreme Court adopted this doctrine to address landowners' rights to percolating groundwater under their property:

> This rule does not prevent the extraction of groundwater subjacent to the soil so long as it is taken in connection with a beneficial enjoyment of the land from which it is taken. *If it is diverted for the purpose of making reasonable use of the land from which it is taken, there is no liability incurred to an adjoining owner for a resulting damage.*

Bristor v. Cheatham, 255 P.2d 173, 180 (Ariz. 1953) (emphasis added); *see also Chino Valley II*, 638 P.2d at 1328 (the doctrine of reasonable use "is supported by the better reasoned decisions in this country"). The Arizona Supreme Court held that the doctrine "does not prevent any reasonable development of [one's] land by mining or the like, although the underground water of neighboring proprietors may thus be interfered with or diverted. . . ." *Bristor*, 255 P.2d at 180; *see also Evans v. City of Seattle*, 47 P.2d 984, 987 (Wash. 1935) (cited with approval in *Bristor*, 255 P.2d at 178) ("The fact is well established that the appellant City was making a reasonable use of its own property, and that the draining of the gravel pit was for the reasonable and proper purpose of extracting the gravel for use."); *Clinchfield Coal Corp. v. Compton*, 139 S.E. 308, 313 (Va. 1927) (the doctrine does not "prevent any reasonable development of his land by mining or the like, although the underground water of neighboring properties may thus be interfered with or diverted"); *Bayer v. Nello L. Teer Co.*, 124 S.E.2d 552, 559 (N.C. 1962) (Defendant using its rock quarry in a legitimate and natural manner "*was not required by law to use the percolating waters, and the fact that it did not use it under those circumstances does not*

make it chargeable with waste") (emphasis added); *Finely v. Teeter Stone, Inc.*, 248 A.2d 106 (Md. 1968) (holding dewatering a quarry, resulting in a lower water table and causing sinkholes on a neighbor's land, was not actionable under the reasonable use doctrine).

In this case, Abbott was making reasonable use of its property by expanding its manufacturing facilities. In doing so, it had to dewater an excavation to build a basement. Even if this dewatering lowered the water table under the Bradys' property, Abbott is not liable for negligence or nuisance under the doctrine of reasonable use. The Ninth Circuit correctly applied this doctrine.

The Ninth Circuit also properly distinguished the case relied on by the Bradys and the District Court, *Farmers Investment Co. v. Bettwy*, 558 P.2d 14 (Ariz. 1976) ("*FICO*"). In *FICO*, a mining company was withdrawing groundwater from property it owned in one location, transporting the groundwater to another location, and using the water at that second location. Because the mining company was not withdrawing the groundwater to make beneficial use of the land from which it was taken and was instead transporting it for use at another location, the Arizona Supreme Court concluded the use was not reasonable. *Id.*, 558 P.2d at 21. The Ninth Circuit properly recognized the *FICO* case has no application here because Abbott was withdrawing the water to make beneficial use of the land from which the water was withdrawn. The doctrine allows a landowner to pump groundwater to dry out excavations to make use of its property. *See, e.g., Evans*, 47 P.2d at 988.

Accordingly, the Ninth Circuit properly applied the common law of Arizona in reversing the District Court.

V. *CHERRY V. STEINER* AND *CHINO VALLEY II* DO NOT CONFLICT WITH THE NINTH CIRCUIT'S OPINION IN THIS CASE.

The Bradys argue that the Ninth Circuit's Opinion conflicts with the Ninth Circuit's 1983 decision in *Cherry v. Steiner*, 716 F.2d 687 (9th Cir. 1983) and the Arizona Supreme Court's opinion in *Chino Valley II* because these opinions allegedly held that the Arizona Groundwater Code "materially changed the old common law doctrine of reasonable use such that groundwater pumpers are no longer immune from liability. . . ." Petition at 13. The Bradys' argument is without merit. The common law doctrine of reasonable use is very much alive in Arizona, and no conflict exists between the Ninth Circuit Opinion in this case and the cases cited by the Bradys.

After the Supreme Court decided *FICO*, a decision that restricted the transportation of groundwater from one property to another, an uproar ensued. *Town of Chino Valley v. State Land Dep't*, 580 P.2d 704, 705-06 (Ariz. 1978) ("*Chino Valley I*"). As a result, the Arizona Legislature first enacted an interim groundwater code to allow the transportation of groundwater that had been occurring prior to January 1, 1977 but which the *FICO* court prohibited. *Id.*, 580 P.2d. at 706. The Legislature enacted this interim legislation because the "application of existing law preventing the transfer of groundwater jeopardizes the economy and well-being of the people of this state and prevents certain necessary distribution of Arizona's groundwater resources." *Id.* In *Chino Valley I*, the Town

attacked the interim groundwater code as unconstitutional. The Arizona Supreme Court rejected the attack. *Id.*

Thereafter, the legislature enacted the Groundwater Code of 1980. The Town of Chino Valley attacked the constitutionality of the 1980 Code as well. *Chino Valley II, supra*. Among other things, the 1980 Groundwater Code allowed transportation of groundwater *within the same sub-basin without the payment of damages*. *Id.*, 638 P.2d at 1326; A.R.S. § 45-541. The 1980 Code also allowed transportation between sub-basins or away from Active Management Areas but damages must be paid for any injury caused. *Id.*; A.R.S. §§ 45-542 – 543.

The Arizona Supreme Court held the 1980 Groundwater Code was constitutional. *Chino Valley II*, 638 P.2d at 1328. The court held that "there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct of the water." *Id.* The court explained that the usufruct of the water was the right to capture groundwater to the extent it exists beneath one's property:

> The common law concept of absolute ownership of percolating water while it is in one's land gave him the right to abstract from his land all the water he could find there. On the other hand, it afforded him no protection against the acts of his neighbors who, by pumping on their own land, managed to draw out of his land all the water it contained. Thus, the term 'ownership' as applied to percolating water never meant that the overlying owner had a property or proprietary interest in the corpus of the water itself.
>
> * * *

> The right of the owner to ground water underlying his land is to the usufruct of the water and not the water itself.

Id., quoting *Village of Tesquesta v. Jupiter Inlet Corp.*, 371 So. 2d 663, 666-67 (Fla. 1979), *cert. denied*, 444 U.S. 465, 100 S.Ct. 453 (1979).

In *Cherry*, land owners again attacked the constitutionality of the 1980 Groundwater Code – this time in federal court. The District Court stated that the Groundwater Code "does recognize the reasonable use doctrine," *Cherry*, 543 F.Supp. 1270, 1276 (D. Ariz. 1982), and it cited *Bristor* for the Arizona Supreme Court's conclusion "that the overlying owner's right is to the *use* of the water, not the water itself." *Id.* at 1278 (emphasis in original). Neither the District Court nor the Ninth Circuit suggested, much less held, that *Bristor's* statement of the common law was no longer valid. Indeed, *Cherry* reinforced the applicability of the common law doctrine of reasonable use.

The District Court in *Cherry* held the Code was constitutional in reliance on the Arizona Supreme Court's opinion in *Chino Valley II*, stating that "the decision explicitly held that *there is no right of ownership in groundwater prior to its capture. A landowner* whose land overlies groundwater has only the right to use of the water, but *maintains no proprietary interest in the actual water.*" *Cherry*, 543 F.Supp. at 1277 (emphasis added). The Ninth Circuit, in turn, stated "[w]e have examined the Arizona cases and agree with the district court that *Chino Valley II* was not a 'startling' and 'unpredictable' change in Arizona property law, *if it represents any change at all.*" *Cherry*, 716 F.2d at 692 (emphasis added).

Thus despite the Bradys' arguments to the contrary, the 1980 Groundwater Code and the *Cherry* and *Chino Valley II* cases support the validity of the doctrine of reasonable use and its application to the facts of this case. The Bradys, like Abbott, have a right to access the common groundwater supply and to "capture" water if it is available. The Bradys do not, however, own the groundwater, and they have no right to prevent any other landowner from accessing the common supply. Because the Bradys' entire case is premised on the idea that they should be entitled to forever maintain groundwater under their property at a depth of 16 feet, their claim must fail. As the District Court stated in *Cherry*,

> [g]roundwater knows no boundaries and may flow under the land of several landowners. *It would be impossible to accord to each overlying landowner the right to the underlying, percolating water*, as withdrawal by one owner necessarily interferes with the enjoyment of the like privilege of other owners.

Cherry, 543 F.Supp. at 1278 (emphasis added), *aff'd*, 716 F.2d at 689. Far from confirming that the Groundwater Code did away with the doctrine of reasonable use, both the District Court and the Ninth Circuit in *Cherry* relied on and reaffirmed the continued validity of that doctrine in deciding the issues before them. Because they did so, *Cherry* is entirely consistent with the Ninth Circuit's Opinion in this case. In fact, one of the goals of the 1980 Groundwater Code was not to do away with the doctrine of reasonable use as the Bradys argue, but a substantial liberalization of the doctrine to allow transportation of groundwater for beneficial uses on other lands. This

transportation to use groundwater to benefit other lands was not allowed under the common law doctrine.

The Bradys' assertion that the doctrine of reasonable use is the "old" law in Arizona is plainly wrong. Indeed, on four separate occasions since *Chino Valley II* was decided, the Arizona Supreme Court has reaffirmed the continued validity of the doctrine of reasonable use. First, in 1992 the court noted that "Arizona law recognized no right to reserve water for some potential future use," and the court then concluded there is "no legally recognized property right in potential, future groundwater use. . . ." *In the Matter of the Rights to the Use of the Gila River*, 830 P.2d 442, 451 (Ariz. 1992) ("*Gila River I*"). The court expressly relied on *Chino Valley II* for this conclusion. *Id.*

In 1993, the court again stated that groundwater is subject to the doctrine of reasonable use. *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 857 P.2d 1236, 1240 (Ariz. 1993) ("*Gila River II*"). The court did so again in 1999, citing *Bristor* as the basis for the doctrine. *Gila River III*, 989 P.2d at 743 (Ariz. 1999).

Finally, the Court revisited this issue yet again in 2000, when it stated that "a well owner does not own underground water" and "landowners have 'no legally recognized property right in potential future groundwater use'. . . ." *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 9 P.3d 1069, 1083 (Ariz. 2000) ("*Gila River IV*") (citing both *Chino Valley II* and *Gila River I*).

These cases represent an unbroken chain of decisions by the Arizona Supreme Court since *Bristor*. The court has repeatedly held that landowners have the right, under the

doctrine of reasonable use, to pump from the common supply of groundwater to make reasonable use of their property, and no neighboring landowner may reserve that common supply for its own future use. The Bradys, however, seek exactly what the Arizona Supreme Court has said they do not have – a right to maintain the common supply of groundwater at a stable level under their property. Because no such right exists under Arizona law, the Ninth Circuit properly reversed the District Court's judgment, and the Bradys' Petition should be rejected. *Chino Valley II*, 638 P.2d at 1328; *see also Cherry*, 543 F.Supp. at 1278.

CONCLUSION

The Bradys expressly waived the arguments they make here or failed to raise the arguments in the courts below. The Bradys do not possess a federally reserved right to groundwater and do not have standing to assert this argument on behalf of others. Finally, the Petition only raises state law issues that the Ninth Circuit correctly decided. The Court should deny the Bradys' Petition.

Respectfully submitted,

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APPENDIX 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERNEST EUGENE BRADY, husband; MARRITTA KAY BRADY, wife; JAMES DEAN BRADY, husband; FLOSSIE MARIE BRADY, wife,

Plaintiffs-Appellees,

v.

ABBOTT LABORATORIES, an Illinois corporation (including Ross Products Division of Abbor Laboratories, improperly named),

Defendant-Appellant,

and

ABC ENTITIES, I-X; JOHN/JANE DOES I-X; ROSS PRODUCTS, a Division of Abbott Laboratories, Inc.,

Defendants.

No. 04-15257

DC No. CV-01-00886-JAT
D. Ariz.

ORDER

(Filed Nov. 9, 2005)

Before: FARRIS, TASHIMA, and CALLAHAN, Circuit Judges.

Counsel should be prepared to address at oral argument whether the following question should be certified to the Arizona Supreme Court for decision:

Does the Arizona Groundwater Code, Ariz. Rev. Stat. § 45-518(A), include an implied private right of action for the recovery of damages for the withdrawal of groundwater based on negligence *per se*, and, if so, does that right include a right to the maintenance of a groundwater basin's water table at any specified height?

(3)

No. 06-117

Supreme Court, U.S.
FILED
AUG 29 2006
OFFICE OF THE CLERK

In the
Supreme Court of the United States

ERNEST EUGENE BRADY and MARRITTA KAY BRADY, husband and wife; JAMES DEAN BRADY, a single man, FLOSSIE MARIE BRADY, a single woman,
Petitioners,

v.

ABBOTT LABORATORIES, INC., an Illinois corporation; ROSS PRODUCTS, a division of Abbott Laboratories, Inc.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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I. Abbott's Manufactured Waiver Argument Does Not Change The Fact That The Ninth Circuit Has Entered A Decision Which Conflicts With Its Own Earlier Decision On The Same Important Issue.

In utter disregard of the 1980 Arizona Groundwater Code, Abbott manufactures a waiver argument predicated upon a false distinction between a common law action for damages and a statutory action for damages. As a matter of law, however, Section 45-545 of the Code **unconditionally** provides that "in **any** action to recover damages...**any** landowner" may sue, and it then sets forth the "damage rules applicable to **all** transportation of groundwater". Neither the Arizona Supreme Court, nor the Ninth Circuit, nor the District Court, nor the Code itself, distinguishes between common law actions for damages and statutory actions for damages, nor do they require statutory actions to the exclusion of common law actions; all merely hold that the Code permits "**any** action" for damages.

It was for this very reason that the Bradys' counsel acknowledged to the Ninth Circuit at oral argument that the Bradys were not relying on any statutory claim under the Code, precisely because **they did not have to rely on the Code** since the Code **unconditionally** authorizes "**any** action" for damages, which certainly includes the Bradys' common law action here. Contrary to Abbott's manufactured argument, the Bradys did not waive or disclaim anything; they merely affirmed the express provisions of the Code to the Ninth Circuit, which then erroneously ignored this fundamental principle of Arizona groundwater law, to the unconstitutional detriment of thousands of farmers like the Bradys and all other federal reserved groundwater rights holders throughout the arid Southwest.

In all their earlier decisions after the promulgation of the Code, the Ninth Circuit, the District Court, and the Arizona Supreme Court repeatedly recognized that the Code permits "**any** action" for damages, and they repeatedly upheld numerous victims' common law actions for damages arising out of the illegal pumping of Arizona's precious groundwater supply.

In *Cherry v. Steiner*, 716 F.2d 687 (9th Cir. 1983), the Ninth Circuit adopted the District Court's analysis of Arizona groundwater law, stating, "**The transporter could be sued for damages, however, if it damaged other landowners who owned land over the same groundwater basin or aquifer.**" *Cherry v. Steiner*, 543 F. Supp. 1270, 1274 (D. Ariz. 1982)(emphasis added). The Ninth Circuit further adopted the District Court's statement that "**the transporter is subject to damages**" if others like the Bradys were harmed by the depletion of the groundwater. *Cherry v. Steiner*, 543 F. Supp. 1270, 1276 (D. Ariz. 1982)(emphasis added). Neither the Ninth Circuit nor the District Court ever held, as Abbott so speciously argues here, that the victim must specifically assert a statutory cause of action rather than a common law cause of action, or be left without a remedy.

In its earlier decision, the Ninth Circuit likewise adopted the Arizona Supreme Court's analysis of Arizona law in *Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981), stating that Prescott's claim of immunity under the Code "**did not preclude Chino Valley from recovering damages**" for the harm suffered due to Prescott's pumping of the groundwater. *Cherry*, *supra* at 691; *Chino Valley*, *supra* at 80, 638 P.2d at 1326 (emphasis added). Again, neither the Ninth Circuit nor the Arizona Supreme Court ever held that the victim was required to assert a statutory action for damages under the Code to the exclusion of a common law

action in order to recover damages. Abbott's false distinction between a statutory cause of action and a common law cause of action–manufactured out of thin air to support its otherwise unsupportable waiver argument–therefore is meritless as a matter of law. *Cherry, Chino Valley, supra.*

II. The Old Common Law Defense Of Reasonable Use Was Eviscerated By The 1980 Groundwater Code.

Abbott now suddenly pretends that the old common law defense of reasonable use survived unscathed notwithstanding the passage of the 1980 Groundwater Code. Abbott's pretension is disingenuous given its Opening Brief in the Ninth Circuit, wherein Abbott admitted that the Code "**legislatively overruled**" the old common law doctrine of reasonable use.

In stark contrast to Abbott's dishonesty, the Ninth Circuit recognized in *Cherry v. Steiner*, 716 F.2d 687 (9th Cir. 1983) that the 1980 Groundwater Code materially changed the old common law doctrine of reasonable use such that groundwater pumpers were no longer immune from liability for harm to adjoining landowners solely because their pumping benefitted the property from which the groundwater was extracted.

The Ninth Circuit's erroneous decision below, which so clearly conflicts with its earlier correct decision in *Cherry, supra,* is poignantly revealed by the authoritative treatise "Arizona Environmental Law Manual" published by the State Bar of Arizona, which states that the Code "**essentially did away with the reasonable use doctrine** (emphasis added). Arizona Environmental Law Manual, Chapter 3.2, *Water Law*, §§ 3.2.4.2 and 3.2.4.2.5 (Nicholas J. Wallwork ed. 1995).

In his compelling dissent from the denial of rehearing *en banc*, Justice Hawkins–**a former Arizona attorney**–correctly recognized this fundamental principle of Arizona law, citing to authoritative treatises which state that the Code "**replaced the traditional reasonable use doctrine**." *Brady v. Abbott Laboratories, Inc.*, 446 F.3d 924 (9th Cir. 2006). Justice Hawkins further correctly observed that the 1980 Groundwater Code "**dramatically altered the groundwater landscape [and] significantly modified the rights of landowners to remove groundwater underlying their land**." *Id.* at 925.

Furthermore, in *Cherry, supra*, the Ninth Circuit recognized that the Arizona Supreme Court had already held that, **unlike** the old common law doctrine of reasonable use, the 1980 Groundwater Code protected a landowner's right to the "usufruct" of the groundwater. *Cherry, supra* at 693, n.1. Abbott's illegal pumping destroyed the Bradys' legally protected usufruct right to the groundwater. There is not one state or federal court decision in the country which supports the Ninth Circuit's Opinion below that **illegal** pumping constitutes a "reasonable use". **Indeed, illegal pumping cannot, as a matter of law, ever constitute the "reasonable use" of either the groundwater or the property from which it was withdrawn**.

Abbott's conclusory allegation that the Arizona Supreme Court "reaffirmed the continued validity of the old common law doctrine of reasonable use...on four separate occasions" is a gross misstatement of the case law. Contrary to Abbott's distortions, the Arizona Supreme Court was addressing only the issue of **actual ownership** of groundwater, not whether there was a remedy for damages to **usufruct rights** caused by the **illegal** pumping of groundwater. Abbott's citation to the *Chino Valley* decision as ostensible authority for its allegation

that the Bradys' usufruct right affords no protection against damage to the groundwater is simply wrong because the Arizona Supreme Court was not addressing a landowner's usufruct rights, but only "the common-law concept of **absolute ownership**" of groundwater. *Chino Valley* at 82. Indeed, the Court ultimately held that "The right of the owner to groundwater underlying his land is to the **usufruct** of the water and not to the **water itself**." *Id.*

The Bradys filed an action for damages to their usufruct rights, the very rights the Arizona Supreme Court held were protected by the 1980 Groundwater Code. Section 45-545 of the Code unconditionally states that "in **any** action to recover damages...**any** landowner" may sue. The Ninth Circuit erroneously ignored these fundamental principles of Arizona groundwater law, and thereby deprived the Bradys, as well as thousands of other farmers and federal reserved groundwater rights holders, of the equal protection of the 1980 Groundwater Code, which was promulgated for the express purpose of protecting them and their precious groundwater supply from damage and destruction.

Abbott's quibbling about the Bradys' standing to direct the Court's attention to the imminent and devastating harm that will be suffered by the thousands of similarly situated farmers and federal reserved groundwater rights holders only serves to highlight the important constitutional issues at stake here for this country's farmers, Native Americans, and our national park system. Indeed, even Abbott acknowledges that this Court has repeatedly carved out an exception when such important constitutional issues are at stake. *Drysdale v. United States*, 491 U.S. 617 (1989); *Barrows v. Jackson*, 346 U.S. 249 (1953).

In direct conflict with its own earlier decision on the same important issue, the Ninth Circuit has bestowed absolute immunity upon all civil and criminal defendants who damage or destroy the groundwater of farmers and other federal reserved groundwater rights holders throughout the arid Southwest and Ninth Circuit, right in the middle of one of the worst droughts in history. Its aberrant decision jeopardizes the precious groundwater rights of thousands of farmers and Native Americans in the very part of this country which so desperately needs the protections of their respective State's Groundwater Codes.

The Bradys' Petition raises precisely the kind of important Constitutional issues of nationwide importance that this Court can, and should, consider, before other courts begin to follow the Ninth Circuit's aberrant decision to the ultimate destruction of this nation's precious groundwater supply.

III. Abbott's Argument That It Never Claimed Statutory Immunity Under § 45-541 Of The Groundwater Code Is Patently False.

Abbott's belated allegation that it never claimed statutory immunity under the Code defies credulity given its pleadings in the District Court and in the Ninth Circuit. Abbott makes this argument now, however, in an misguided attempt to insinuate that the Bradys raised the statutory issues for the first time on appeal. The record on appeal repeatedly refutes Abbott's allegation.

In defense against the Bradys' negligence claim in the District Court, Abbott contended that the Bradys "also ignore the fact that the Groundwater Code specifically authorizes dewatering permits, see A.R.S. § 45-518, as well as transportation of groundwater off of the land where it is

pumped and within the same groundwater sub-basin. See A.R.S. § 45-541(A)."

In defense against the Bradys' nuisance claim in the District Court, Abbott contended that the Bradys were not entitled to recover any damages because "the Legislature specifically allowed transportation of groundwater within a sub-basin, and such transportation is not subject to payment of damages. See A.R.S. § 45-541." Abbott even contended that the Bradys' reliance on relevant Arizona case law was "misplaced" because all of that case law was "outdated" and had been "superceded by the Groundwater Code."

In its proposed Findings of Fact and Conclusions of Law filed in the District Court, Abbott repeatedly cited to A.R.S. § 45-541 and contended that it was statutorily immune from liability for destroying the Bradys' pecan orchard.

In its section of the Amended Joint Proposed Final Pretrial Order filed in the District Court, Abbott repeatedly contended that it was statutorily immune from liability under the "Arizona State Groundwater Code."

Most recently, in its Opening Brief filed in the Ninth Court, Abbott cited to A.R.S. § 45-541 and contended that it is statutorily immune from liability for destroying the Bradys' pecan orchard. Abbott even contended that a decision of the Arizona Supreme Court cited by the Bradys had been "legislatively overruled" by A.R.S. § 45-541.

All of this undisputed evidence proves that Abbott repeatedly asserted the affirmative defense of statutory immunity in the District Court, and that it continued to do so on appeal. Contrary to Abbott's allegation, it is not the Bradys who now attempt to assert a new argument under the

Code; rather, it is Abbott who continued to assert on appeal that which it repeatedly asserted as an affirmative defense in the District Court: the statutory immunity defense under A.R.S. § 45-541. The Bradys merely responded to Abbott's affirmative defense in the District Court with all of the evidence of Abbott's fraudulent concealment of its illegal dewatering activities, because this body of evidence proved, among other things, that Abbott was not entitled to statutory immunity under A.R.S. § 45-541, and that the Bradys were entitled to punitive damages, as the District Court so held.

IV. Abbott's Continued Reliance On the 1953 *Bristor* Case Reveals The Clear Error Of The Ninth Circuit.

The Ninth Circuit's sole support for its Opinion below was an old Arizona Supreme Court decision from 1953, *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953), citing to an even older decision of the Washington Supreme Court from 1935, *Evans v. City of Seattle*, 47 P.2d 984 (1935).

The Arizona Supreme Court, however, later held that groundwater pumpers no longer had immunity under the old common law doctrine of reasonable use as espoused in its earlier decision in *Bristor* because the Arizona Legislature had passed the 1980 Groundwater Code:

> The statements in *Bristor* and *Jarvis* do not mean that rights to the use of groundwaters cannot be modified prospectively by the Legislature.... **The doctrine of rule of property has no operation as against subsequent legislation** (emphasis added).

Chino Valley, *supra* at 81.

In its earlier decision in *Cherry, supra*, the Ninth Circuit agreed with the Arizona Supreme Court when it adopted the District Court's recognition that, given the passage of the 1980 Groundwater Code, it was "misplaced" to rely upon "selected passages of Arizona case law [which] ignore the actions of legislatures and courts throughout the country." *Cherry v. Steiner*, 543 F. Supp. 1270, 1278 (D. Ariz. 1982).

Abbott's pretension that the passage of the 1980 Groundwater Code had no effect upon the old common law doctrine of reasonable use is summarily refuted by the Arizona Supreme Court, which has held that Arizona's rapidly dwindling groundwater required the 1980 Groundwater Code to "**restrict rights**" and "**abolish the prevailing uses of groundwater**" just as many other States throughout the country had done. *Chino Valley*, *supra* at 83. Indeed, the Arizona Supreme Court has held that the very title of the Code put groundwater users on notice that their rights under the old common law doctrine of reasonable use would be "**significantly affected**" by the Code. *Chino Valley*, *supra* at 84 (emphasis added).

In his compelling dissent from the denial of rehearing *en banc*, Justice Hawkins also correctly recognized that the Arizona Supreme Court in yet another case "clearly seems to have assumed" that the 1980 Groundwater Code protected victims like the Bradys, as well as all federal reserved groundwater rights holders, from the illegal pumping of their groundwater. *Brady v. Abbott Laboratories, Inc.*, 446 F.3d 924, 925 (9th Cir. 2006). Justice Hawkins' wisdom demonstrates the erroneous, and ultimately unconstitutional, nature of the Ninth Circuit's decision.

CONCLUSION

The Ninth Circuit's reported decision eviscerates longstanding groundwater law in the very part of the country which so desperately needs the equal protection of that law. The Bradys implore this honorable Court to intervene and correct this manifest, and unconstitutional, injustice.

The Bradys therefore respectfully request the Court to grant their Petition for a Writ of Certiorari, vacate the Ninth Circuit's Opinion and Order, and thereby restore the equal protection of the law to the Bradys and the thousands of other farmers, Native Americans, and all present and future federal reserved groundwater rights holders throughout Arizona and the arid Southwest and Ninth Circuit.

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